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No.:

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

THE SYNANON CHURCH, CHARLES E. DEDERICH,
Petitioners,

– AGAINST –

READER'S DIGEST ASSOCIATION, INC., DAVID MACDONALD,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

1. Does a court go beyond the protections specifically afforded under the First Amendment by *New York Times v. Sullivan* and its progeny and into the prohibited area of "double counting" when it purposefully treats defendant's motion for summary judgment as a "favored remedy" by weighing the evidence and credibility of witnesses, refusing to draw all inferences in favor of the party opposing the motion and requiring the plaintiff to prove the defendant's actual malice by clear and convincing evidence?

2. May a court fail to cumulate circumstantial evidence so as to avoid a triable question of fact as to a libel defendant's state of mind on the issue of actual malice?

3. Do the lower court's new evidentiary rules, which eliminate previously accepted evidence of actual malice, improperly foreclose the trial of this case and of most public figure libel cases?

4. Is it error to impose public figure status on a libel plaintiff without identifying with specificity a public controversy underlying the defamation?

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THE SYNANON CHURCH, CHARLES E. DEDERICH,
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– AGAINST –

READER'S DIGEST ASSOCIATION, INC., DAVID MACDONALD,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

To the Justices of the Supreme Court of the United States:

Petitioners, The Synanon Church ("Synanon") and Charles E. Dederich ("Mr. Dederich"), respectfully pray that a Writ of Certiorari issue to review the judgment of the California Supreme Court which issued a writ of mandate directing the Superior Court of the State of California for the County of Marin to vacate its order denying the motion for summary judgment of defendants Reader's Digest Association, Inc. ("Reader's Digest") and David MacDonald ("Mr. MacDonald") and to enter an order granting defendants' motion for summary judgment.

OPINION BELOW

The opinion of the California Supreme Court is reported at *Reader's Digest Assn. v. Superior Court*, 37 Cal.3d 244, 690 P.2d 610 (1984) and is reproduced in Appendix 'A' to this Petition [the Appendix is referred to herein as "App."] (App. 1a-60a). The prior order of the California Court of Appeal, First District Division Three, denying defendants' petition for an alternative writ is unreported and is reproduced in Appendix 'B' (App. 61a). The opinion and order of the Superior Court of the State of California for the County of Marin, denying defendants' motion for reconsideration of the previous order denying summary judgment, is unreported and is reproduced in Appendix 'C' (App. 62a-68a). The opinion and order of the Superior Court, denying defendants' motion for summary judgment, is unreported and is reproduced in Appendix 'D' (App. 69a).

JURISDICTION

The judgment of the California Supreme Court was entered November 19, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

In this action, Synanon and Mr. Dederich sued Reader's Digest and Mr. MacDonald (the writer) for libel over an article published in July of 1981. Defendants brought a motion for summary judgment.

Both the trial court and the California Supreme Court held that Synanon and Mr. Dederich were "public figures" under *New York Times Company v. Sullivan*, 376 U.S. 254 (1964). The trial court also found the article contains defamations which were statements of fact; that finding was not contested by defendants at the appellate level. The falsity of the article was never at issue in the summary judgment proceeding.

The primary dispute at the appellate level was, instead, whether there was a sufficient showing of defendants' "actual malice" under the First Amendment standard to allow petitioners to take their libel case to the jury. The reversal of the trial court decision resulted from the creation by the California Supreme Court of an extraordinarily high standard of review, in which summary judgment in a defamation case was held to be a "favored remedy":

> We recognize a potential chilling effect from protracted litigation as well as a public interest in resolving defamation cases promptly. That does not mean, however, that a court should grant summary judgment when there is a triable issue of fact as to actual malice. Instead, courts may give effect to these concerns regarding a potential chilling effect by finding no triable issues unless it appears that actual malice may be proved at trial by clear and convincing evidence — i.e., evidence sufficient to permit a trier of fact to find for the plaintiff and for an appellate court to determine that the resulting judgment " 'does not

> constitute a forbidden intrusion on the field of free expression' " (*Bose Corp. v. Consumers Union, supra*, ____ U.S. ____ at p. ____ [80 L.Ed.2d 502 at p. 515]). To this extent, therefore, summary judgment remains a "favored" remedy in defamation cases involving the issue of "actual malice" under the *New York Times* standard. (App. 12a-13a.)

As set forth in footnote 9, *infra*, the California Supreme Court erroneously analyzed *Bose Corp. v. Consumers Union of U.S., Inc.*, 104 S.Ct. 1949 (1984) as presenting a question of the review of a motion for summary judgment as opposed to the standard of appellate review after *trial*. This fundamental misunderstanding of the *Bose* case may well have caused the California Supreme Court to create this unprecedented standard on a motion for summary judgment.[1]

The Defamation and the Injury

Synanon was founded by Mr. Dederich in 1958 for the purposes, inter alia, of reeducating and reorienting character-disordered persons (commonly referred to as rehabilitating drug addicts, alcoholics and juvenile delinquents). Throughout Synanon's history to the present, Synanon has been actively engaged in its primary activity of the reeducation and reorientation of such character-disordered persons. In January of 1978, Mr. Dederich retired as chairman of the board of Synanon, and by the summer of 1978, when he became seriously ill, Mr. Dederich had retired from all active management of the corporation and lived in seclusion.

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[1]The conflict among the authorities as to the proper standard on a libel defendant's motion for summary judgment is discussed in Point I, below, pages 10 ff.

The *Reader's Digest* article repeated many allegations of violence and misconduct which had been published for many years about Synanon and Mr. Dederich. Most importantly, however, three uniquely defamatory sentences were published which caused, according to affidavits of witnesses who read the article, unique and serious damage to the reputations and incomes of Synanon and Mr. Dederich. These three highly damaging defamations were as follows:

> Synanon was founded in 1958 by Charles Dederich, a reformed alcoholic, to rehabilitate drug addicts. Though his spectacular claims of success were never proved, Dederich and Synanon attracted wide publicity and enough cash donations to start a string of addiction centers.
>
> • • • •
>
> Since 1968, minimal drug rehabilitation work had been attempted; funds, however, were still solicited on that basis.

The vast majority of Synanon's income is derived from Synanon's private revenue producing venture of selling advertising gifts and premiums throughout the nation (referred to as "ADGAP"). Synanon's efforts in ADGAP are a primary tool for the reeducation and reorientation of character-disordered individuals.[2] Synanon does not depend on government grants or contributions from the public for its support.

Affidavits were submitted from 7 persons who were not affiliated with Synanon, but who had read the article and

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[2]ADGAP teaches these people to read, to write, to speak proper English, to use the telephone, to plan and perform work, to present a mannerly and attractive appearance, to understand our capitalistic system, to be honest, and to practice other essential basic skills and values.

refused to do business with Synanon as a result of the three key sentences. Also, affidavits from Synanon executives and others swore to the damaging effect of the three key sentences. In addition, an affidavit from an English language expert established the factual, defamatory nature of the three key sentences separately and in the context of the entire article.

The trial court found, and the respondents never contested on appeal, that "the statements complained of in this action are reasonably susceptible to a libelous interpretation; i.e., Synanon was not successful in its rehabilitative efforts, Synanon has abandoned its rehabilitative purpose, and funds were solicited on a fraudulent basis."[3]

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[3]The California Supreme Court completely disregarded the affidavits, and the defamatory meaning to which the statements were reasonably susceptible, and stated as follows:

> The Reader's Digest article described Synanon as an organization which, under Dederich's leadership, had eventually adopted and carried out a policy of violence and intimidation. It is replete with statements referring to serious crimes, including attempted murder. The present lawsuit, however, ignores most of those charges, and instead quibbles about the wording of what would appear to be three of the more innocuous sentences in the article. (App. 57a-58a)

The California Supreme Court erroneously considered petitioners to be suing only on three isolated sentences taken out of context. In fact, the complaint stated that petitioners set forth the three sentences in their complaint "without limitation to other portions of the article," that the article *as a whole* was alleged to be false and defamatory, and that the article "in its entirety cast plaintiffs and their work in a false light, and created a false and defamatory impression in the minds of readers of *Reader's Digest* that Synanon and Mr. Dederich have not made significant contributions in the field of reeducating persons, that their claims of success were falsely made and that they abandoned efforts in the reeducation of character-disordered persons as of 1968. Readers understood from the article as a whole that Synanon no longer takes care of juvenile delinquents, drug addicts and alcoholics who come to it for help."

(footnote continued next page)

Evidence of Actual Malice

After reading only a few articles, the writer, Mr. MacDonald, decided his attack, declaring in his early proposals for the article that Synanon seemed "very, very nasty indeed" and that Synanon was "a onetime rehab program that had somehow turned into a quasi-religious cult." From the first, everything Reader's Digest did on the article was designed to attack the reputation of Synanon and Mr. Dederich, including their reputations in the field of rehabilitation.

The article was published more than one year after Mr. MacDonald submitted his outline. There was no time pressure whatsoever on Mr. MacDonald, who admitted in deposition that the article was not "hot news." Mr. MacDonald admitted he never attempted to speak to Mr. Dederich, to any officer or director of Synanon, to any other person associated with Synanon, to anyone in a program which had imitated Synanon's drug rehabilitation activities, to anyone who had ever lived in Synanon at any time, to anyone who was doing business with Synanon, to anyone who had sent someone to Synanon for help, or to anyone who might possibly have had something favorable to say about Synanon or Mr. Dederich. While working on his story, Mr. MacDonald even drove past a Synanon property to see it, but he never stopped or attempted to speak with anyone there.[4]

Primarily from the three sentences listed above, *in context*, Synanon suffered many millions of dollars in lost revenue as a direct result of the defamatory interpretation of the article. Mr. Dederich, likewise, suffered pecuniary loss and other extensive, well-documented actual injuries from the article as a whole and, specifically, the three complained of sentences.

[4]The "researcher," Heather Chapman, was assigned to "check the accuracy" of the article, but neither the researcher, nor anyone else associated with Reader's Digest, ever attempted any of these in-

The primary sources relied on by Reader's Digest are Richard Ofshe and David Mitchell. Their book, *The Light On Synanon,* was "a major source."[5] However, in their depositions, Mr. Mitchell and Mr. Ofshe both denied having said in their interviews what Reader's Digest and MacDonald have claimed was said. There are at least 11 separate points at which there is a discrepancy between what Reader's Digest published or claimed their sources said, and what Mr. Mitchell and Mr. Ofshe claim they said about the rehabilitation efforts of Synanon and Mr. Dederich.[6] Even had Messrs. Ofshe and Mitchell said what they are claimed to have said, it is admitted that Reader's Digest knew that Synanon was in a dispute with these persons, that a lawsuit was pending between them, and that there were other experts available who had for years arrived at conclusions contrary to those alleged conclusions of Ofshe and Mitchell.

The presence of evidence sufficient to find prior knowledge of actual falsity applies to the statement that since 1968 Synanon and Mr. Dederich had attempted minimal drug rehabilitation. In Reader's Digest's own files, there were two 1970 *Reader's Digest* a.ticles about Synanon and Mr.

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vestigations either. Reader's Digest's own written standards of investigation were violated.

[5]Cathy Mitchell also co-authored the book, but in the record to date Mr. MacDonald and Reader's Digest place little other reliance on Mrs. Mitchell.

[6]*See*, Appendix 'E', chart entitled "Assertions by Reader's Digest Contradicted by Ofshe & Mitchell Which Create a Triable Question of Fact of Actual Malice." The California Supreme Court concluded that the discrepancies were within the proper realm of "literary license" (App. 42a-55a) – a conclusion used to avoid giving effect to evidence of actual malice which other authorities would have found to be sufficient to raise a triable question of fact so as to leave the actual malice question to the jury. *See*, Point III, below, pages 19 ff.

Dederich, which both directly contradict the statement that, since 1968, minimal drug rehabilitation work had been attempted. In direct violation of Reader's Digest's own written standards, the extensive information in these two articles and other sources was disregarded.

In addition, Mr. MacDonald's own notes reflect that 1,000 persons each year come to Synanon and even that some drug users coming to Synanon are sent by social agencies and courts.

Other evidence of actual malice is found in the activities of the editors. First, two international editions containing the subject article were distributed after service of the complaint in this litigation.

Second, Mr. MacDonald originally wrote the following sentence in his revised original draft:

> One attentive reader was Jack Hurst, a onetime heroin user who spent 17 years in Synanon and became one of its directors.

An editor, Francis Schell, struck the words "a onetime heroin user" and added a marginal notation as follows: "Credibility — of rehabilitation program!" Mr. MacDonald then submitted further changes and suggestions to the draft, and reinserted the words "onetime heroin user," accompanied by the caveat in the margin "accuracy." The "researcher" also noted in the margin "a onetime heroin user." The book *The Light On Synanon* makes frequent reference to Mr. Hurst having been profoundly helped by Synanon. He is identified as "one of Synanon's first 'cures,'" and he is quoted as saying, "I got my problem cured, and I went to work for them as an executive." Nevertheless, the editor prevailed, and the final published article

does not contain any reference to Mr. Hurst as a "onetime heroin user."[7]

Third, Norman L. Smith, editor, made a notation on a draft as follows:

> Qualification needed. As a *True* editor back in 1967, I initiated 1st expose — but, alas, the story was ignored.

Petitioners were not permitted to depose Mr. Schell or Mr. Smith, since all discovery by petitioners was stayed pending appellate review of the trial court's denial of defendants' motion for summary judgment.[8]

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[7]A jury could reasonably infer that editor Schell, who insisted on deleting the reference to Hurst's rehabilitation, made the change so that the portrait of Synanon and Mr. Dederich would not be marred by an inconsistency, even if true. It can be inferred that it was the editor's intent to ignore the truth if it lent any credibility to Synanon's drug rehabilitation efforts. A finding of a material question of fact as to either knowing falsity or reckless disregard under the actual malice test was properly available from such inferences.

In contrast, the California Supreme Court treated this evidence as follows:

> Plaintiffs infer from this cryptic comment that the editor was unwilling for the article to acknowledge that even one former drug user had been rehabilitated by Synanon. But under the *St. Amant* standard, the nonobjectivity of the editor is not the issue. To show actual malice, plaintiffs would have to draw the inference that the editor's knowledge of Hurst's rehabilitation led him to doubt the truth of the article's statements that after 1968 Synanon's rehabilitation program was minimal. This is a dubious inference at best; moreover, with the Hurst deletion as the strongest evidence we have found in the record to support plaintiffs' position, we conclude that a trier of fact could not find clear and convincing evidence of actual malice. (App. 40a-41a)

[8]Petitioners filed a fourteen-page affidavit with the trial court identifying eight specific Reader's Digest employees, including editors Schell and Smith, whose depositions were needed to oppose

(footnote continued next page)

REASONS FOR GRANTING THE WRIT

I

IN DIRECT AND IRRECONCILABLE CONFLICT WITH STATEMENTS BY THIS COURT AND DECISIONS BY FEDERAL COURTS OF APPEALS AND OTHER STATE COURTS OF LAST RESORT, THE LOWER COURT EMPLOYED AN IMPERMISSIBLE FORM OF "DOUBLE COUNTING" BY HOLDING THAT SUMMARY JUDGMENT IN A LIBEL CASE IS A "FAVORED REMEDY." THE COURT WEIGHED THE EVIDENCE, EVALUATED THE CREDIBILITY OF WITNESSES, RESOLVED FACTUAL QUESTIONS, REFUSED TO MAKE INFERENCES IN A LIGHT MOST FAVORABLE TO THE PARTY OPPOSING THE MOTION, AND REQUIRED PLAINTIFFS TO SHOW ACTUAL MALICE BY CLEAR AND CONVINCING EVIDENCE.

In what promises to be a landmark decision contradicting the pronouncements of this Court, if this Petition is not granted, the California Supreme Court has boldly created an unprecedented and virtually insurmountable barrier to a libel plaintiff taking the question of actual malice to a jury. In 1979, this Court first intimated that a summary judgment motion by a libel defendant on the actual malice question should be treated the same as a summary judgment motion in any other type case, and that summary judgment should be the exception, rather than the rule:

> Considering the nuances of the issues raised here, we are constrained to express some doubt about the so-

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the motion for summary judgment. That affidavit described at length the possible role of each person whose deposition was sought. The California Supreme Court apparently did not find this affidavit in the record, and it erroneously noted that petitioners' "request for additional discovery suggests no specific persons or documents to be examined." (App. 55a, n. 15)

called "rule." The proof of "actual malice" calls a defendant's state of mind into question, *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), and does not readily lend itself to summary disposition. See 10 C. Wright & A. Miller, Federal Practice and Procedure § 2730, pp. 590-592 (1973). Cf. *Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979). *Hutchinson v. Proxmire*, 443 U.S. 111, 120, n. 9 (1979).

In March of 1984, this Court made its position even clearer:

> Moreover, the potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits. See *New York Times, Inc. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). To reintroduce those concerns at the jurisdictional stage would be a form of double counting. We have already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws. See, *e.g.*, *Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 60 L. Ed.2d 115 (1979) (no First Amendment privilege bars inquiry into editorial process). See also *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n. 9, 99 S.Ct. 2675, 2680 n. 9, 61 L.Ed.2d 411 (1979) (implying that no special rules apply for summary judgment). *Calder v. Jones*, 104 S.Ct. 1482, 1488 (1984).

One month after the *Calder v. Jones* opinion, this Court reaffirmed that the First Amendment allows for two protections for a libel defendant: a public figure must prove

actual malice at trial by clear and convincing evidence, and appellate courts must make an independent examination of the whole record of the trial of the actual malice question to confirm that actual malice was proven by the requisite showing. *Bose Corp. v. Consumers Union of U.S., Inc.*, 104 S.Ct. 1949 (1984). This Court has consistently refused, since *New York Times Company v. Sullivan*, 376 U.S. 254 (1964) to impose any greater burden on a libel plaintiff under the First Amendment than the two protections reiterated in the *Bose* decision.

The position of the lower court is in direct conflict with the line of cases refusing to give a motion for summary judgment favored treatment.[9] This conflict is well illustrated by the recent, fundamentally different treatment of the issue by the Court of Appeals for the District of Columbia Circuit, wherein it was held a libel defendant's motion for summary judgment is not a favored remedy and that a libel plaintiff is not required under the First Amendment to present clear and convincing evidence of actual malice at summary judgment:

> With regard to the "clear and convincing evidence" requirement, the issue can be framed as follows: whether, in order to deny the defendant's motion for summary judgment, the court must conclude that a reasonable jury not only could (on the basis of the facts taken in the light most favorable to the plaintiff) find the existence of actual malice, but could find that it had been established with "convincing clarity." We con-

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[9]Most significantly, the lower court misread the *Bose* decision. The California Supreme Court construed the *Bose* case as coming before the United States Supreme Court on review of a motion for summary judgment. (App. 10a, n. 3) However, there was a 19 day trial in *Bose*. *Id.*, 104 S.Ct. at 1953. This Court addressed in *Bose* the review of a libel case *after trial*, and not after a motion for summary judgment.

> clude that the answer is no. Imposing the increased proof requirement at this stage would change the threshold summary judgment inquiry from a search for a minimum of facts supporting the plaintiff's case to an evaluation of the weight of those facts and (it would seem) of the weight of at least the defendant's uncontroverted facts as well. It would effectively force the plaintiff to try his entire case in pretrial affidavits and depositions — marshalling for the court *all* the facts supporting his case, and seeking to contest as many of the defendant's facts as possible. *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1570 (D.C. Cir. 1984). (Emphasis in original).

The Court of Appeals for the District of Columbia Circuit followed this Court's prior statements, in stark contrast to the treatment accorded by the California Supreme Court:

> [I]f summary judgment were supposed to be based on a "clear and convincing" standard, it is hard to explain the Supreme Court's statement questioning the asserted principle that in public figure libel cases "summary judgment might well be the rule rather than the exception," and affirming to the contrary that "[t]he proof of 'actual malice' . . . does not readily lend itself to summary disposition." *Hutchinson v. Proxmire*, 443 U.S. 111, 120 & n. 9, 99 S.Ct. 2675, 2680 & n. 9, 61 L.Ed.2d 411 (1979). There is slim basis for such a statement if, in order to survive a motion for summary judgment, the plaintiff must establish an arguably "clear and convincing" case. *Liberty Lobby, Inc. v. Anderson*, *supra*, at 1570.

Moreover, the Court of Appeals for the District of Columbia Circuit properly construed this Court's decision in *Bose Corp. v. Consumers Union*, *supra*, in direct conflict with the analysis taken by the California Supreme Court:

> With regard to the *Bose* requirement of independent judicial determination we reach the same conclusion, for the same compelling practical reason: it is simply incompatible with the preliminary nature of the summary judgment inquiry. If it were to be applied at that early stage, summary judgment would be converted from a search for the minimum amount of evidence that could persuade a reasonable person into the final assessment of "actual malice" by the court itself — final, at least, if the court concludes actual malice has not been established. That would compel the plaintiff to present his full case prematurely, with the undesirable consequences described above. In addition, courts of appeal would be burdened with the unusual task of making the largely factual determination of actual malice in many cases where a judge or jury verdict against the plaintiff would render that unnecessary.
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> For the foregoing reasons, we believe that the constitutional requirements of "clear and convincing" proof and independent judicial determination of the ultimate issue of actual malice are to be applied only after the plaintiff has had an opportunity to present his evidence. *Liberty Lobby, Inc. v. Anderson, supra*, at 1571.

Thus, two separate issues emerge. First, does the First Amendment require a libel plaintiff to raise at the summary judgment stage a triable question of fact as to actual malice "with convincing clarity"? In the District of Columbia Circuit, the answer is in the negative; and in California, the answer is in the affirmative. Second, does the First Amendment require that a motion for summary judgment in a libel case be a "favored remedy," to be treated procedurally in a different way from a motion for summary

judgment in any other case? In the District of Columbia Circuit, the answer is in the negative; in California, it is in the affirmative.

In further conflict with California, other federal courts of appeals and state courts of last resort have held that a motion for summary judgment in a libel case is not to be accorded favored treatment. *See, e.g., Yiamouyiannis v. Consumers U. of United States*, 619 F.2d 932, 940 (2d Cir. 1980), *cert. denied*, 449 U.S. 839 (1980); *Rebozo v. Washington Post Co.*, 637 F.2d 375, 381 (5th Cir. 1981), *cert. denied*, 454 U.S. 964 (1981); *Guam Federation of Teachers, Local 1581, A.F.T. v. Ysrael*, 492 F.2d 438, 441 (9th Cir. 1974), *cert. denied*, 419 U.S. 872 (1974); *Schultz v. Newsweek, Inc.*, 668 F.2d 911, 917 (6th Cir. 1982); *Beamer v. Nishiki*, 670 P.2d 1264, 1273 (Hawaii 1983); *Fulton v. Advertiser Co.*, 388 So.2d 533, 539 (Ala. 1980), *cert. denied*, 449 U.S. 1125 (1981).

A statement by this Court in *Bose* highlights the urgency with which this Court's review of the standard is needed in this case:

> When the standard governing the decision of a particular case is provided by the Constitution, this Court's role in marking out the limits of the standard through the process of case-by-case adjudication is of special importance. This process has been vitally important in cases involving restrictions on the freedom of speech protected by the First Amendment, particularly in those cases in which it is contended that the communication in issue is within one of the few classes of "unprotected" speech.
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> * * * *
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> Libelous speech has been held to constitute one such category, see *Beauharnais v. Illinois*, 343 U.S. 250, 72

S.Ct. 725, 96 L.Ed. 919 (1952) . . . . *Bose Corp. v. Consumer's Union of U.S., Inc.*, 104 S.Ct. 1949, 1961 (1984).[10]

California has now effectively prevented the trial of a public figure's libel suit, in contrast to other jurisdictions in America.[11] This situation, and the favored treatment rule which underlies it, is in direct conflict with the prevailing rules in other states and circuits. This conflict can only be corrected by the attention of this Court.

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[10]The decision of the lower court leaves no doubt that it was based upon the federal constitutional standard, and the court even expressly held that the article was a "constitutionally protected publication." (App. 57a)

[11]The highly unusual treatment of the evidence by the lower court appears from the opinion itself, which clearly demonstrates that there are triable issues of fact, because the lower court repeatedly debates petitioners' evidence with counter-evidence and counter-inferences, showing that the questions are questions of fact. A few of the more striking examples of where the lower court acted like a jury (determining facts, rather than merely finding the existence of triable questions of fact) are where the court found that the portions of the article which factually depart from the statements by the sources are proper instances of "literary license," where the court debated the quality of the inferences to be drawn from the deletion of reference to Jack Hurst as a "onetime heroin user" along with the marginal notation "Credibility – of rehabilitation program!", where the court argued that Mr. MacDonald could reasonably have felt that his note that 1,000 persons a year come into Synanon reflected only a "minimal" drug rehabilitation program, where the court referred to evidence it felt showed that the article was true, where the court found it reasonable for Reader's Digest to publish the article in two editions after receiving a demand for retraction (although it was actually after suit was served), and where the court held that Mr. MacDonald's letter containing statements of his disapproval of Synanon "seems reasonable."

II

IN DIRECT CONFLICT WITH PREVAILING REPORTED DECISIONS SINCE 1964, THE COURT BELOW FAILED TO CONSIDER PROPERLY THE CIRCUMSTANTIAL EVIDENCE, SINCE THE COURT BELOW ONLY CONSIDERED EACH PIECE OF CIRCUMSTANTIAL EVIDENCE IN A VACUUM, IGNORING WHETHER ITS CUMULATIVE EFFECT CREATED A MATERIAL QUESTION OF FACT.

The California Supreme Court analyzed each piece of evidence separately and independently to determine whether each piece was itself of sufficient weight to amount to clear and convincing evidence of reckless disregard. In so doing, the California Supreme Court has added one more unprecedented barrier to a public figure taking his libel case to the jury.[12]

Several decisions of this Court have suggested or expressly approved the use of indirect, circumstantial evidence to infer or prove the existence of actual malice, noting that direct evidence on the issue will be difficult, and exceedingly rare, to obtain. *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 156-158 (1967); *St. Amant v. Thompson,* 390 U.S. 727, 732-733 (1968); *Herbert v. Lando,* 441 U.S. 153, 172-173 (1979). Circumstantial evidence, by its very nature, must be looked at in the aggregate and cumulated. *United States v. Calaway,* 524 F.2d 609, 612 (9th Cir. 1975),

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[12]The opinion of the court below is unclear at best as to whether the court looked for anything other than "direct" evidence. The court never said whether there was sufficient *circumstantial* evidence of actual malice. In contrast, it stated specifically as follows:

> Upon examining the record before us, we find no triable issue as to actual malice. There is no *direct* evidence that MacDonald or other Reader's Digest personnel believed the questioned passages in the artcle were false, or even entertained serious doubts respecting their truth. (App. 33a-34a) (Emphasis added.).

cert. denied, 424 U.S. 967 (1976); *United States v. Geaney,* 417 F.2d 1116, 1121 (2d Cir. 1969), *cert. denied,* 397 U.S. 1028 (1970).

The nexus between circumstantial evidence and cumulative effect was directly expressed in *Goldwater v. Ginzburg,* 414 F.2d 324 (2d Cir. 1969), *cert. denied,* 396 U.S. 1049 (1970). In contrast to the result reached by the California Supreme Court, the *Goldwater* Court held:

> There is no doubt that evidence of negligence, of motive and of intent may be adduced for the purpose of establishing, by *cumulation* and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity. *Id.,* at 342. (Emphasis added).

While this cumulative effect of circumstantial evidence is particularly important at the motion for summary judgment stage, the decision of the court below also conflicts with the decision of the Nevada Supreme Court, wherein it was held that, at trial, cumulation is proper and, usually, necessary:

> Evidence of negligence, motive, and intent may be used, cumulatively, to establish the necessary recklessness. [R. Sack, *Libel, Slander and Related Problems* (1980)] at 214. It is clear that in most instances one factor alone will not establish actual malice by convincing clarity. *Id.* at 217. *Nevada Ind. Broadcasting Corp. v. Allen,* 664 P.2d 337, 344-45 (Nev. 1983).

Thus, by requiring only evidence, which separately, in and of itself, constitutes clear and convincing evidence of a serious doubt in the mind of Reader's Digest or Mr. MacDonald, the California Supreme Court refused to allow a trier of fact to make inferences from the cumulative effect of several different pieces of evidence. By holding that the *New York Times v. Sullivan* standard prohibits cumulation

of circumstantial evidence on a motion for summary judgment, the California Supreme Court has created a standard in conflict with decisions of this Court, of federal courts of appeals and of state courts of last resort.

III

THE COURT BELOW ESTABLISHED EVIDENTIARY RULES REGARDING PROOF OF ACTUAL MALICE, WHICH ARE IN CONFLICT WITH DECISIONS OF THIS COURT, FEDERAL COURTS OF APPEALS AND OTHER STATE COURTS OF LAST RESORT, EFFECTIVELY FORECLOSING THE TRIAL OF MOST PUBLIC FIGURE LIBEL SUITS.

Whole classes of evidence, which other courts have held can prove actual malice, have been rejected by the California Supreme Court as even raising a triable question of fact of actual malice. In California and in other jurisdictions which might follow the California Supreme Court's decision, a libel plaintiff will not be allowed to present its case to the jury, even though that plaintiff had produced sufficient evidence of actual malice which in other jurisdictions would have allowed it to have a judgment sustained by independent appellate review. For example, the court below has eliminated the following well-recognized classes of evidence as probative of actual malice:

1. An Editor's Deletion of Facts That Were Contradictory to the Defamation and Apparently Deleted for the Purpose of Increasing the Defamatory Meaning

The treatment by the lower court of the deletion by editor Schell of the reference to Jack Hurst as a "onetime heroin user" with the marginal notation "Credibility — of rehabilitation program!" is in direct conflict with *Time, Inc. v.*

Hill, 385 U.S. 374, 393-394 (including n. 11) (1967) (evidence that an editor deleted a phrase from the article created a question of fact as to actual malice, even though a jury might find that the deletion was innocent or negligent); *Time, Inc. v. Ragano*, 427 F.2d 219, 221 (5th Cir. 1970) (deletion of a phrase describing the plaintiff during the editorial process created a genuine issue of material fact concerning Time's actual malice); *Wasserman v. Time, Inc.*, 424 F.2d 920, 922 (D.C. Cir. 1970), *cert. denied*, 398 U.S. 940 (1970) (same); *see, also, Westmoreland v. CBS, Inc.*, 596 F.Supp. 1170, 1174-77 (S.D.N.Y. 1984) (editorial bias evidenced by deletions resulting in a distortion can raise triable questions of fact as to actual malice to foreclose summary judgment).

2. Evidence of a Predisposition to Publish an Adverse Representation of Plaintiff

The lower court's treatment of statements by Mr. MacDonald of his predisposed antagonism towards petitioners, and the marginal notation by editor Smith that, "I initiated 1st expose — but, alas, the story was ignored," is in conflict with *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 158 (1967) (a predisposition to create an expose or engage in "muckraking" may properly be considered as evidence from which a triable question of fact as to actual malice may be adduced); *Goldwater v. Ginzburg*, 414 F.2d 324, 340 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970) (evidence of a "preconceived plan to attack Senator Goldwater" tends to establish actual malice); *Stevens v. Sun Publishing Co.*, 270 S.C. 65, 240 S.E.2d 812, 815 (1978), *cert. denied*, 436 U.S. 945 (1978) (statements of author of article that he had something "juicy" to print about plaintiff and that his newspaper did not like plaintiff were evidence of actual malice).

3. Failures in Investigation, Including Refusal to Contact Subject or Anyone Favorable to Subject, Where a Story Is Not Hot News

Reader's Digest violated its own written standards by failing even to attempt to corroborate its sources, including refusing to try to contact petitioners, anyone favorable to petitioners, or experts whom Reader's Digest knew about.[13] In addition, two prior articles about Synanon and Mr. Dederich by Reader's Digest that contradicted the defamations were disregarded in violation of Reader's Digest's own written standards.[14]

The treatment by the lower court of evidence that Reader's Digest failed to conduct an adequate investigation, in violation of its own written standards, for a story that was in preparation for more than a year and was admittedly not "hot news" is in conflict with *Curtis Publishing Co. v. Butts, supra,* at 156 (the fact that the story was not "hot news" and editors did not attempt to corroborate their information by known experts in a technical area, the subject, or other obvious sources was evidence of actual malice);[15]

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[13]It is admitted that Reader's Digest knew that many experts and Synanon disputed Ofshe's and the Mitchells' views about Synanon. It can be inferred that the refusal of Reader's Digest personnel even to attempt to contact anyone favorable to petitioners was an intentional decision to insulate themselves from any possibly favorable information that would give rise to knowing falsity and would eliminate their protestations of a good faith belief in their highly negative portrait.

[14]In determining that these articles did not substantially contradict the defamations, the California Supreme Court not only was in error in its conclusion, but undertook the resolution of a factual question properly for jury consideration.

[15]The California Supreme Court argues that the *Curtis* decision was superseded by this Court's decision in *St. Amant v. Thompson*, 390 U.S. 727 (1968). (App. 31a, n. 9) The California Supreme Court's analysis is contradicted by the fact that this Court in *St.*

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Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 171 (1979) (Blackmun, J. concurring) (a writer with more time to investigate the facts, such as an historian, may "run a greater risk of liability for defamation," than a reporter trying to meet a deadline); *Kuhn . Tribune-Republican Pub. Co.*, 637 P.2d 315, 319 (Colo. 1981) (a failure to investigate adequately when no urgency as to the time of publication is relevant to actual malice); *Vandenburg v. Newsweek, Inc.*, 507 F.2d 1024, 1026 (5th Cir. 1975) (actual malice may be inferred from the quality of the investigation for an article that is not hot news); *Stevens v. Sun Publishing Co.*, 270 S.C. 65, 240 S.E.2d 812, 815 (1978), *cert. denied*, 436 U.S. 945 (1978) (same); *see, also, Goldwater v. Ginzburg*, 414 F.2d 324, 339 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970); *Hunt v. Liberty Lobby*, 720 F.2d 631, 643 and 645 (11th Cir. 1983); *Burns v. McGraw-Hill Broadcasting Co., Inc.*, 659 P.2d 1351, 1362 (Colo. 1983); *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 273 A.2d 899, 916 (1971).

4. Publishing the Defamation After Direct and Specific Notification of Its Falsity

The treatment by the lower court of the fact that after Reader's Digest was sued over the article, it published the article without any further checking, corroboration or explanation of Synanon's complaints in two different editions[16] is in conflict with *Curtis Publishing Co. v. Butts, supra*, at 161, n. 23 (the lack of further investigation after

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Amant both discussed the *Curtis* analysis with approval and held that it adhered "to the line which our cases have drawn between false communications which are protected and those which are not." *St. Amant v. Thompson, supra*, at 732.

[16]The lower court erroneously stated that the two editions were published after a demand for retraction. In fact, the two editions were published well after this suit was filed and the complaint had been served on Reader's Digest.

plaintiff and plaintiff's daughter notified the publisher that the published article was false may be evidence of actual malice); *Levine v. CMP Publications, Inc.*, 738 F.2d 660, 675 (5th Cir. 1984) (publishing a defamatory statement a second time without correcting it, after plaintiff warned of its falsity, may sustain a jury verdict of actual malice); *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1569 (D.C. Cir. 1984) (notice containing specific verifiable facts contradicting the allegations of the article to cause a reasonable person to conduct further inquiry (as in Petitioners' complaint against Reader's Digest and Mr. MacDonald) may be sufficient evidence of actual malice to overcome a summary judgment).

5. Sources Casting Doubt on the Claims of the Publisher as to What the Sources Had Said to the Publisher

The treatment by the lower court of the numerous discrepancies in the evidence as to what Messrs. Ofshe and Mitchell said to Reader's Digest and Mr. MacDonald[17] is in conflict with *Liberty Lobby, Inc. v. Anderson, supra*, at 1578 (where sources assert the facts contrary to what the publisher claimed they asserted, it is a jury question whether the defamation was made with actual malice); *Nader v. de Toledano*, 408 A.2d 31, 53-54 (D.C.App. 1979), *cert. denied*, 444 U.S. 1078 (1980) (explicit finding in Senate Subcommittee Report that Nader had acted in good faith was not subject to a rational interpretation that Nader had falsified and distorted evidence, and, therefore, a jury could draw the inference of actual malice); *Hunt v. Liberty Lobby,*

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[17]The "literary license" analysis by the lower court is another result of its misreading of the *Bose* case. The question of whether it was reasonable for the author to interpret his source in a certain way is a classic jury question, which should not be decided on summary judgment. That question is, however, as the *Bose* Court noted, an appropriate question for independent appellate review after trial.

720 F.2d 631, 645 (11th Cir. 1983) (publishing a defamation which contradicts information known to the publisher itself gives rise to an inference of actual malice); *Time, Inc. v. Ragano*, 427 F.2d 219, 221 (5th Cir. 1970) (the argument by the publisher that its characterization of the plaintiff was "journalistically" proper raised a triable question of fact as to malice); *Steadman v. Lapensohn*, 408 Mich. 50, 288 N.W.2d 580, 582-83 (1980) (plaintiff's denial that he made quoted statements to defendant permitted an inference of actual malice); *American Ben. Life Ins. Co. v. McIntyre*, 375 So.2d 239, 246 (Ala. 1979) (actual malice could be inferred where a report which defendant used as a source of his story contradicted libelous statements); *Carson v. Allied News Co.*, 529 F.2d 206, 212, 213 (7th Cir. 1976) (nothing in the record supported the allegation in the defamatory statement, creating a triable question of fact as to actual malice); *see, also, Herbert v. Lando*, 596 F.Supp. 1178, 1212-13, 1217-19 (S.D.N.Y. 1984) (each conflict between what a source claimed to say to the author and what the author claimed was said to him created triable issues of fact); *Westmoreland v. CBS Inc.*, 596 F.Supp. 1170, 1175-77 (S.D.N.Y. 1984) (denials by sources that they had been told to hold down the enemy troop estimates raised triable questions of knowing or reckless falsity).

The conflict between California and other jurisdictions on what may constitute probative evidence of actual malice is irreconcilable at this time. This Court's clarification of the types of evidence that may create a jury question on the issue of actual malice is critically needed for purposes of predictability and consistency of the law.

IV

BY FAILING TO IDENTIFY WITH SPECIFICITY ANY "PUBLIC CONTROVERSY," THE LOWER COURT FOUND PETITIONERS TO BE PUBLIC FIGURES BASED UPON AN ANALYSIS THAT HAS BEEN REJECTED BY THIS COURT AND, THEREBY, IS IN CONFLICT NOT ONLY WITH DECISIONS OF THIS COURT, BUT ALSO RECENT DECISIONS OF FEDERAL COURTS OF APPEALS AND STATE COURTS OF LAST RESORT.

In conflict with recent authorities, the court below failed to identify any "public controversy" about which the defamation was written. Public interest, newsworthiness, a "general controversy," being "in the public eye" are not enough. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Wolston v. Reader's Digest Ass'n. Inc.*, 443 U.S. 157 (1979). The public controversy about which the plaintiff is defamed must be identified specifically and clearly. *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 590 (1st Cir. 1980) ("Our first task, following the guidance of *Firestone*, is to determine whether there was 'the sort of public controversy referred to in *Gertz*' "); *Street v. National Broadcasting Co.*, 645 F.2d 1227, 1234 (6th Cir. 1981), *cert. dismissed*, 454 U.S. 1095 (1981) (holding that the first step in public figure analysis is "does a 'public controversy' exist?"); *Clark v. American Broadcasting Companies, Inc.*, 684 F.2d 1208, 1218 (6th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983) (same); *Denny v. Mertz*, 106 Wis.2d 636, 318 N.W.2d 141, 147 (1982), *cert. denied*, 459 U.S. 883 (1982) ("First, there must be a public controversy").[18]

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[18]A decision analyzing facts strikingly similiar to the facts of this case and presenting an excellent and correct analysis of the question in this case is *Davis v. Keystone Printing Service, Inc.*, 111 Ill.App.3d 427, 444 N.E.2d 253 (1982) (a nationally recognized founder of a

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> As the first step in its inquiry, the court must isolate the public controversy. A public controversy is not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way.
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> Courts must exercise care in deciding what is a public controversy. Newsworthiness alone will not suffice, for the alleged defamation itself indicates that someone in the press believed the matter deserved media coverage.
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> To determine whether a controversy indeed existed and, if so, to define its contours, the judge must examine whether persons actually were discussing some specific question. A general concern or interest will not suffice. *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1296-97 (D.C. Cir. 1980) (footnotes omitted).

As the lower court stated, its determination of public figure status "is grounded in their myriad attempts to thrust their case and Synanon in general into the public eye." (App. 22a). This standard resurrects the rejected "newsworthy" standard of the plurality in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). Being famous is not the same as being a public figure in a libel case. *Wolston v. Reader's Digest Ass'n, Inc., supra*, at 167 ("A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention."); *Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976) (declining "to equate 'public

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religion, whose primary work was rehabilitation, was accused in the article of illegal acts directly relating to his rehabilitation efforts and was found to be a private figure).

controversy' with all controversies of interest to the public"); *Diversified Management v. Denver Post, Inc.*, 653 P.2d 1103, 1107 (Colo. 1982) ("The mere fact that the press was attracted to appellants' activities does not make them public figures").

The lower court took the "shoebox full" approach to the question by looking only at the amount of publicity.[19] There was no pending public controversy about the amount of rehabilitation Synanon was performing, nor was there such a controversy for at least 15 years before 1981. Not only was there no public controversy about Mr. Dederich's efforts in drug rehabilitation, but also Mr. Dederich had, before the summer of 1978, more than three years before the article was published, secluded himself from the press and the public. The factual basis for the lower court finding Mr. Dederich a public figure was that he had founded Synanon in 1958, had years before directed Synanon and had received publicity, which is a completely insufficient basis for a public figure determination. *Wolston v. Reader's Digest Ass'n, Inc., supra.* By imposing public figure status without identifying the public controversy, the lower court acted in direct and irreconcilable conflict with the prevailing authorities.

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[19]The lower court relied heavily on the fact that Synanon had sent demands for retraction to the media. These demands for retraction were sent only as required by California *Civil Code* § 48a. The lower court made the public figure determination by resolving factual questions, which some courts have indicated should be left to trial. *Cahill v. Hawaiian Paradise Park Corporation*, 56 Hawaii 522, 543 P.2d 1356, 1368-69 (1975).

The effect of the lower court's decision on future public figure libel cases will be quite significant, as evidenced by the fact that the lower court has already vacated and remanded back to the California Court of Appeal at least one case based upon its decision in this case. *Dalitz, et al. v. Penthouse International, Ltd., et al.*, Case No. 69025, Order of the Supreme Court of the State of California, December 13, 1984 (one of the "Rancho La Costa cases").

CONCLUSION

Because the California Supreme Court has fashioned a unique interpretation of the First Amendment to create enormous extra protections for the media, public figure libel suits in California have been virtually eliminated. Where does the victim of an irresponsible defamation obtain protection? Prior restraint is virtually unavailable. No longer can the victim of irresponsible journalism flee across the city, across the state or across the country to avoid the damage of a defamation such as the one in this case, which reached every corner of the world. The cover of *Reader's Digest* magazine proclaims that *Reader's Digest* is the "World's Most-Read Magazine" with "over 31 million copies in 16 languages bought monthly." Defamation actions are essential to protect the freedom of the press, by allowing citizens to fight for their freedom from an irresponsible press, as well as to protect the reputation of each of us from irresponsible publications. The *New York Times* decision arose out of unique circumstances, in a unique time, with unique parties. To paraphrase Mr. Justice Holmes, that landmark decision was a great, hard case, which has led other courts to make bad law. The decision of the California Supreme Court is the type of bad law that Mr. Justice Holmes predicted follows on the heels of great cases. The principles underlying the *New York Times* decision must be restated by this Court to prevent the injustice and error in the lower court's decision.

The reputations of Mr. Dederich and Synanon are of grave importance not only to them, but also to their friends, family and supporters. The attack by Reader's Digest and Mr. MacDonald, contained primarily in the three key sentences identified specifically in the complaint, goes to the heart of Synanon's business and the life work of Mr. Dederich and his significant contributions. The California Supreme Court decision gives Mr. Dederich and Synanon no

opportunity to counter the attack. Such a unique, unjust and damaging result was never intended by the architects of the First Amendment or by this Court. In direct conflict to the statements of this Court and the holdings of federal courts of appeals and other state courts of last resort, the California Supreme Court has doubled and redoubled protections afforded to the press, in derogation of the rights of citizens. The decision of the California Supreme Court is unprecedented, resulting in a grave injustice. Only this Court can remedy the lower court's egregious error, and for the reasons set forth in this Petition, it is of the utmost urgency that this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A - Opinion of the California Supreme Court Dated November 19, 1984

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

READER'S DIGEST ASSOCIATION, INC., et al.,

Petitioners, S.F. 24686

v.

THE SUPERIOR COURT OF MARIN COUNTY,

Respondent;

SYNANON CHURCH et al.,

Real Parties in Interest.

OPINION

BROUSSARD, Acting Chief Justice

Petitioners seek a writ of mandate to review a ruling of the Marin County Superior Court denying their motion for summary judgment.

Petitioners are codefendants in a suit for libel and related causes of

action filed by the Synanon Church (Synanon) and Charles Dederich, its founder. Plaintiffs allege that they were defamed in an article written by David MacDonald, an employee of Reader's Digest, and published in the July 1981 edition of Reader's Digest. The article, entitled The Little Paper That Dared, describes how David and Cathy Mitchell, publishers of the Point Reyes Light, received the Pulitzer Prize for a series of reports and articles critical of Synanon. Although Synanon has filed other suits attacking the articles in the Point Reyes Light, the present action relates only to the Reader's Digest article.

David MacDonald based his article on the Mitchells' newspaper accounts, their subsequent book, The Light on Synanon, research papers on Synanon by Richard Ofshe, professor of sociology at

the University of California, and conversations with Ofshe and the Mitchells. The Mitchells reviewed a draft of the article and suggested corrections, some of which Reader's Digest adopted.

The article recounts the history of Synanon from its inception in 1958 as a program for the rehabilitation of drug addicts. It notes the transformation of Synanon into an "alternative life-style community," claiming to be a church, and describes the Mitchells' accusation that local officials had been lax in enforcing the law against Synanon. The Reader's Digest article went on to charge that Synanon had adopted a policy of intimidation, and cited examples: an assault on a former member when he returned to visit the Synanon facility in west Marin County, and a similar attack on another member who left Synanon when

he refused Dederich's orders to have a vasectomy. In particular, the article discussed the case of Paul Morantz, an attorney who had filed several suits against Synanon and who was bitten by a rattlesnake placed in his mailbox. Dederich and two Synanon members were charged with conspiracy to murder Morantz, and were subsequently convicted and sentenced.

Despite the numerous and serious charges stated in the article, plaintiffs' lawsuit singles out only three sentences as defamatory. These sentences read: "Synanon was founded in 1958 by Charles Dederich, a reformed alcoholic, to rehabilitate drug addicts. Though his spectacular claims of success were never proved, Dederich and Synanon attracted publicity and enough cash donations to start a string of addiction centers. . . . Since 1968, minimal drug rehabilitation

work had been attempted; funds, however, were still solicited on that basis." Plaintiffs assert that the sentences communicate to the reader "that plaintiffs have not been and are not successful in rehabilitating drug addicts and other character-disordered persons and that plaintiffs' representations of success were fraudulently made to enrich themselves."/1

Synanon's suit names Reader's Digest, MacDonald, Ofshe, and the Mitchells as defendants. Reader's Digest and MacDonald moved for summary judgment. They claim that Synanon and Dederich are "public figures" under the New York Times

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1/ We do not understand the reference to "character-disordered persons" in the complaint and in plaintiffs' arguments. The questioned sentences, as we read them, refer only to the rehabilitation of drug addicts and to the solicitation of funds for that purpose.

doctrine (New York Times Co. v. Sullivan (1964) 376 U.S. 254 [11 L.Ed.2d 686, 84 S.Ct. 710, 95 A.L.R. 2d 1412]), and consequently that defendants can be liable only for a statement "made with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." (376 U.S. at pp. 279-280 [11 L.Ed.2d at p. 706].) The moving defendants maintain that there is no triable issue of fact as to actual malice, and hence that they are entitled to summary judgment. The trial court stated that the issue was close, but denied the motion. Reader's Digest and MacDonald now seek review by writ of mandate./2 We will conclude that the

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2/ "A writ of mandate is a proper remedy to compel a trial court to grant a motion for summary judgment where the affidavits in support of the moving party are sufficient to sustain a judgment in his favor, and his opponent does not

(Continued on next page)

trial court erred in denying the motion for summary judgment and that the writ of mandate should therefore issue.

I. Summary Judgment as a Favored Remedy in Defamation Actions.

Before addressing the merits of the ruling below, we first examine whether summary judgment is a favored or disfavored remedy in defamation cases. In 1978, this court in Good Government Group of Seal Beach, Inc. v. Superior Court (1978) 22 Cal.3d 672 [150 Cal.Rptr. 258, 586 P.2d 572], said that "because unnecessarily protracted litigation would have a chilling effect upon the exercise of First Amendment

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(Footnote 2 continued)
by counteraffidavit show facts sufficient to present a triable issue of fact." (Roman Catholic Archbishop v. Superior Court (1971) 15 Cal.App.3d 405, 410 [93 Cal.Rptr. 338]; Iversen v. Superior Court (1976) 57 Cal.App.3d 168, 170-171 [127 Cal.Rptr. 49]; see Whitney's at the Beach v. Superior Court (1970) 3 Cal.App.3d 258, 265-266 [83 Cal.Rptr. 237].)

rights, speedy resolution of cases involving free speech is desirable. [Citing Dombrowski v. Pfister (1965) 380 U.S. 479, 486-487 [14 L.Ed. 22, 28-29, 85 S.Ct. 1116].] Therefore, summary judgment is a favored remedy, and upon such a motion the trial court must determine whether there is a sufficient showing of malice to warrant submission of that issue to the jury." (P. 685.) Court of Appeal decisions echo this approving view of summary judgment, though cautioning that summary disposition is not appropriate if a triable issue of fact exists. (See Kaufman v. Fidelity Fed. S. & L. Assn. (1983) 140 Cal.App.3d 913, 920 [189 Cal.Rptr. 818]; Bill v. Superior Court (1982) 137 Cal.App.3d 1002, 1015 [187 Cal.Rptr. 625]; Desert Sun Publishing Co. v. Superior Court (1979) 97 Cal.App.3d 49, 53 [158 Cal.Rptr. 519]; Fuhrman v. Risner (1979) 92 Cal.App.3d

725, 730-731 [155 Cal.Rptr. 122].)

The United States Supreme Court, and in particular Chief Justice Burger, however, has implied that summary judgment may be unsuited for deciding issues of actual malice. In Hutchison v. Proxmire (1979) 443 U.S. 111 [61 L.Ed.2d 411, 99 S.Ct. 2675], the district court had granted summary judgment for defendant, noting that in deciding issues of actual malice "summary judgment might well be the rule rather than the exception." (P. 120 [61 L.Ed.2d at p. 422].) While reversing the district court on other grounds (the high court held that plaintiff was not a public figure and thus the New York Times standard did not apply), the opinion commented in a footnote: "Considering the nuances of the issues raised here, we are constrained to express some doubt about the so-called 'rule'. The proof of

'actual malice' calls a defendant's state of mind into question, New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and does not readily lend itself to summary disposition. [Citations.] In the present posture of the case, however, the propriety of dealing with such complex issues by summary judgment is not before us." (443 U.S. at p. 120, fn. 9 [61 L.Ed.2d at p. 422].)/3

It is pointless to declare in the

3/ The court referred to this footnote in Wolston v. Reader's Digest Assn., Inc. (1979) 443 U.S. 157, 161, footnote 3 [61 L.Ed.2d 450, 416, 99 S.Ct. 2701], but again declined to decide the role of summary judgment in defamation litigation. In Bose Corp. v. Consumers Union (1984) ___ U.S. ____ [80 L.Ed.2d 502, 104 S.Ct. 1949], the district court had granted summary judgment for plaintiff; the court of appeals reversed and the Supreme Court affirmed the court of appeals. Its decision holds that an appellate court has a duty to make an independent examination of the record in First Amendment cases, but did not discuss whether such cases should be decided by summary judgment.

abstract that summary judgment is a favored or disfavored remedy. A more subtle analysis is required -- one that explains how a motion for summary judgment should be decided in a defamation case under the New York Times test. The Fifth Circuit in Rebozo v. Washington Post Co. (1981) 637 F.2d 375, undertook such an analysis and reached the following conclusion: "[T]he standard of review of First Amendment defamation actions, as in all summary judgment cases, is whether the record, construed in a light most favorable to the party against whom the judgment has been entered, demonstrates there are genuine issues of fact which, if proven, would support a jury verdict for that party. Since, however, a jury verdict in a defamation case can only be supported when the actual malice is shown by clear and convincing evidence, rather than by a

preponderance of evidence as in most other cases, Brewer v. Memphis Publishing Co., 626 F.2d 1238, 1258 (5th Cir. 1980), the evidence and all the inferences which can reasonably be drawn from it must meet the higher standard." (P. 381.)

We recognize a potential chilling effect from protracted litigation as well as a public interest in resolving defamation cases promptly. That does not mean, however, that a court should grant summary judgment when there is a triable issue of fact as to actual malice. Instead, courts may give effect to these concerns regarding a potential chilling effect by finding no triable issues unless it appears that actual malice may be proved at trial by clear and convincing evidence -- i.e., evidence sufficient to permit a trier of fact to find for the plaintiff and for an appellate court to determine that the resulting judgment

"'does not constitute a forbidden intrusion on the field of free expression'" (Bose Corp. v. Consumers Union, supra, ___ U.S. ____ at p. ____ [80 L.Ed.2d 502 at p. 515]). To this extent, therefore, summary judgment remains a "favored" remedy in defamation cases involving the issue of "actual malice" under the New York Times standard.

II. Synanon and Charles Dederich are "Public Figures."

Synanon and its founder, Dederich, first contest their status as "public figures," a question of law which is crucial to the proper resolution of their libel claim./4 In New York Times Co. v. Sullivan (1964) 376 U.S. 254 [11 L.Ed.2d 686, 84 S.Ct. 710, 95 A.L.R.2d 1412], the

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4/ The trial court found as a matter of law that Synanon and Dederich were "public figures" under the relevant standards.

United States Supreme Court fundamentally altered judicial treatment of defamation actions by placing a significant constitutional limitation on the ability of a public official to recover damages for a defamatory falsehood. Emphasizing the importance of free expression and a free press under the First Amendment, the Supreme Court determined that "public officials" may not prevail in an action for libel relating to their official conduct absent proof that the statement was made with "actual malice." (See also St. Amant v. Thompson (1968) 390 U.S. 727, 731 [20 L.Ed.2d 262, 267, 88 S.Ct. 1323].) Three years later, the court held that "public figures" -- like public officials -- must also prove actual malice in order to recover in a defamation action. (Curtis Publishing Co. v. Butts (1967) 388 U.S. 130 [18 L.Ed.2d 1094, 87 S.Ct. 1975].) Though

holding that the plaintiffs in the two cases before it properly fell under the aegis of "public figures," the court did not offer an encompassing definition of that term./5 Further refinement of the concept was developed in subsequent United States Supreme Court decisions.

In Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323 [41 L.Ed.2d 789, 94 S.Ct. 2997], the court provided a twofold rationale for extending the New York Times rule to "public figures." First, it

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5/ In Curtis Publishing Co. v. Butts, supra, 388 U.S. 130 the plaintiff was an athletic director of a major university who challenged a magazine report that he had conspired with a counterpart at another university to fix the outcome of a football contest. Plaintiff in the companion case of Associated Press v. Walker (1967) 388 U.S. 130 [18 L.Ed.2d 1094, 87 S.Ct. 1975] was a retired Army officer who had "thrust himself into the vortex of the controversy" over admission of blacks to a state university. As noted above, both were held to be "public figures" for purposes of their defamation suits.

recognized that public figures are generally less vulnerable to injury from defamation because of their ability to resort to effective "self help." Such persons ordinarily enjoy considerably greater access than private individuals to the media and other channels of communication. This access in turn enables them to counter criticism and to expose the fallacies of defamatory statements. (418 U.S. at p. 344 [41 L.Ed.2d at p. 808].) Second, and more significantly, the court cited a normative consideration that public figures are less deserving of protection than private persons because public figures, like public officials, have "voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." (418 U.S. at p. 345 [41 L.Ed.2d at p. 808]; see also Curtis Publishing Co. v. Butts, supra,

388 U.S. at p. 164 [18 L.Ed.2d at p. 1116] (Warren, C.J., conc. in result).)

Having thus explained the rationale for the public figure classification, the Gertz decision defined two classes of public figures. The first is the "all purpose" public figure who has "achiev[ed] such pervasive fame or notoriety that he becomes a public figures for all purposes and in all contexts." The second category is that of the "limited purpose" or "vortex" public figure, an individual who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." (418 U.S. at p. 351 [41 L.Ed.2d at p. 812].) Unlike the "all purpose" public figure, the "limited purpose" public figure loses certain protection for his reputation only to the extent that the allegedly

defamatory communication relates to his role in a public controversy. In the present case, we find that Synanon should at the very least be classifed as a "limited purpose" public figure for the purposes of this general controversy, and that Dederich is a public figure to the extent that his conduct in directing the activities of Synanon is at issue.

The cases decided since New York Times and Gertz make it clear that a person or group should not be considered a "public figure" solely because that person or group is a criminal defendant (Wolston v. Reader's Digest Assn., Inc., supra, 443 U.S. 157); has sought certain relief through the courts (Time, Inc. v. Firestone (1976) 424 U.S. 448 [47 L.Ed.2d 154, 96 S.Ct. 958]); or merely happens to be involved in a controversy that is newsworthy (Time, Inc. v. Firestone, supra). Rather, as this court

recognized in Vegod Corp. v. American Broadcasting Companies, Inc. (1979) 25 Cal.3d 763 [160 Cal.Rptr. 97, 603 P.2d 14], a "public figure" plaintiff must have undertaken some voluntary act through which he seeks to influence the resolution of the public issues involved./6 As such, the mere

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6/ In Wolston v. Reader's Digest Assn., Inc., supra, 443 U.S. 157, for example, the Supreme Court addressed more specifically the factors which control whether or not a particular plaintiff is a "public figure." Wolston, who had been undergoing interrogation with respect to the activities of Soviet intelligence agents in the United States, failed to respond to a grand jury subpoena. He subsequently pleaded guilty to contempt charges and received a suspended sentence. These proceedings were attended by considerable newspaper publicity, but Wolston then returned to relative obscurity until, some 16 years later, a publisher named him as one of several "Soviet agents identified in the United States." He sued for libel; the publisher asserted the qualified constitutional privilege on the ground that Wolston had become a "public figure." Lower courts agreed with the publisher; the Supreme Court reversed. Particularizing its comments to the facts before it, the Supreme Court said: "[T]he

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involvement of a person in a matter which the media deems to be of interest to the public does not, in and of itself, require that such a person become a public figure for the purpose of a

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(Footnote 6 continued)
mere fact that petitioner voluntarily chose not to appear before the grand jury, knowing that his action might be attended by publicity, is not decisive on the question of public-figure status. . . . [A] court must focus on the 'nature and extent of an individual's participation in the particular controversy giving rise to the defamation.' . . . [P]etitioner never discussed this matter with the press and limited his involvement to that necessary to defend himself of the contempt charge. . . . [*] [T]he simple fact that these events attracted media attention also is not conclusive of the public-figure issue. A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention. . . ." (443 U.S. at p. 167.)

For a detailed discussion of the factors to be considered in determining whether an individual is a public figure for the purposes of a certain issue, see Note, Constitutional Protection of Critical Speech and the Public Figure Doctrine: Retreat by Reaffirmation (1980) Wis. L.Rev. 568.

subsequent libel action.

In sum, when called upon to make a determination of public figure status, courts should look for evidence of affirmative actions by which purported "public figures" have thrust themselves into the forefront of particular public controversies. As is reflected in the evolution of the public figure doctrine, from Butts through Gertz, Firestone and Wolston, such a determination is often a close question which can only be resolved by considering the totality of the circumstances which comprise each individual controversy.

In the instant matter, it is clear that both Synanon and Dederich should indeed by [sic] accorded public figure status for the proper resolution of their defamation action. This determination is not based on the organization's and Dederich's own statements regarding their

public visibility and reputation,/7 but instead is grounded in their myriad attempts to thrust their case and Synanon in general into the public eye.

Plaintiffs have been the subject of a full-length movie (a 1966 production entitled "Synanon" and starring Chuck Connors as the Charles Dederich character), four books, favorable magazine articles in Life, Time and even

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7/ The record contains numerous examples of Synanon and Dederich's own evaluation of their fame. For example, by their own declarations in documents filed in court proceedings, Synanon claims to be "internationally renowned," a "renowned expert," "world-famous," "widely recognized," and "widely known to the community generally." Both Synanon and Dederich claim to have an "international reputation." Dederich summed it up: "We had had enormous amounts of publicity. Now, we really are world famous. I have been more famous than Santa Claus and more people knew about me than knew about World War II. We have been written about, photographed and movied and televised and so on pretty -- pretty steadily through the years. I don't think we are as famous as Muhammed Ali. Of course, nobody is. But we are pretty famous."

Reader's Digest (two 1970 articles) and numerous newspaper articles. For many years Synanon engaged in extensive publicity campaigns in which it sought and achieved a favorable reputation as an organization for the rehabilitation of drug addicts.

When Synanon's reputation began to sour somewhat in the late 1970's, largely as a result of the articles in the Point Reyes Light, Synanon's response went far beyond defensive litigation. In 1979, shortly after the Point Reyes Light received the Pulitzer Prize, the United Press International (UPI) filed a formal complaint against Synanon with the National News Council. UPI charged therein that the foundation had engaged in systematic efforts "to threaten UPI's reputation and, generally, object to any news coverage which reflects unfavorably upon Synanon." UPI further charged that

Synanon's lawyers have been "flooding the nation's news media with letters threatening libel suits as a part of the systematic pattern of intimidation designed to suppress all stories they considered unfavorable." Even reports on the award of the Pulitzer Prize to the Point Reyes Light drew form letters demanding retraction on pain of suit.

In investigating UPI's charges, the National News Council staff discovered that the foundation had initiated the "Retraction Project." According to Synanon's own reports, this project sent out at least 960 letters to the media during 1978 and 1979, arguing its case and intentionally attracting further attention to its cause. Recipients included all the major television networks and many of their affiliates as well as hundreds of newspapers ranging from the Wall Street

Journal and the New York Times to the Billings Gazette (Mont.). Synanon also contracted with a nationwide service to provide clips of articles published relating to its activities, and according to its report, 11,136 such clips were provided during 1978 and 1979 alone.

While any person or organization has the right to engage in publicity efforts and to attempt to influence public and media opinion regarding their cause, such significant, voluntary efforts to inject oneself into the public arena require that such a person or organization be classified as a public figure in any related defamation actions. In the instant case, Synanon and its founder have sponsored massive publicity and self-promotion efforts over a period of many years and apparently <u>increased</u> these efforts with regard to the present controversy. As such, they enjoyed

remarkable access to the media through which to counter any criticisms they deemed to be unwarranted and voluntarily exposed themselves to increased risk of injury from unfavorable commentary about them. Thus they have clearly met the standards for "public figure" status for purposes of this defamation action.

III. The Record Presents No Triable Issue of Actual Malice.

As we noted earlier, the New York Times decision superimposed a constitutional standard on the common law of libel. If the person defamed is a public figure, he cannot recover unless he proves, by clear and convincing evidence (see New York Times Co. v. Sullivan, supra, 376 U.S. 254, 285-286 [11 L.Ed.2d 686, 706-707]), that the libelous statement was made with "'actual malice' -- that is, with knowledge that it was false or with reckless disregard of

whether it was false or not." (Pp. 279-280 [11 L.Ed.2d at p. 706].) That decision did not define the phrase "reckless disregard," and its use of the term -- "actual malice" -- which had a different meaning in the common law of libel, engendered some confusion.

Four years later, in St. Amant v. Thompson, supra, 390 U.S. 727, the high court sought to clarify the constitutional standard. First, it explained, "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." (P. 731 [20 L.Ed.2d at p.

267].)/8

The quoted language establishes a

8/ The court further observed that "[i]t may be said that such a test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity. Concededly the reckless disregard standard may permit recovery in fewer situations than would a rule that publishers must satisfy the standard of the reasonable man or the prudent publisher. But New York Times and succeeding cases have emphasized that the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies. Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirabilty or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones. We adhere to this view and to the line which our cases would have drawn between false communications which are protected and those which are not." (390 U.S. at p. 731-732 [20 L.Ed.2d at p. 267].)

subjective test, under which the defendant's actual belief concerning the truthfulness of the publication is the crucial issue. (See Alioto v. Cowles Communications, Inc. (N.D. Cal. 1977) 430 F.Supp. 1363, 1365-1366.) This test directs attention to the "defendant's attitude toward the truth or falsity of the material published . . . [not] the defendant's attitude toward the plaintiff." (Widener v. Pacific Gas & Electric Co. (1977) 75 Cal.App.3d 415, 434 [142 Cal.Rptr. 304].)

Although the ultimate issue is thus the good faith of the publisher, the court explained that a defendant cannot "automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely

to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." (St. Amant v. Thompson, supra, 390 U.S. 727, 732 [20 L.Ed.2d 262, 267-268], fn. omitted.)

As St. Amant's examples suggest, actual malice can be proved by circumstantial evidence. "[E]vidence of negligence, of motive and of intent may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's

recklessness or of his knowledge of falsity." (Goldwater v. Ginzburg (2d Cir. 1969) 414 F.2d 324, 342; Widener v. Pacific Gas & Electric Co., supra, 75 Cal.App.3d 415, 434.) A failure to investigate/9 (see Widener v. Pacific Gas & Electric Co., supra, 75 Cal.App.3d 415, 435), anger and hostility toward the

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9/ Plaintiff argues that the Reader's Digest had a higher duty to investigate because the article was not "hot news," citing Curtis Publishing Co. v. Butts, supra, 388 U.S. 130, 156 [18 L.Ed.2d 1094, 1111] (opn. of Harlan, J.). The plurality opinion in Curtis proposed an objective standard -- "highly unreasonable conduct" (p. 158 [18 L.Ed.2d at p. 1113]) -- to govern liability in suits by public figures who were not public officials. That standard has since been superseded for both public figures and public officials by the subjective standard set out in St. Amant v. Thompson, supra, 390 U.S. 727. As a result, the distinction between "hot news" and other news drawn by Butts has lost much of its force (see discussion in Barger v. Playboy Enterprises, Inc. (N.D. Cal. 1983) 564 F.Supp. 1151, 1156); it remains relevant only in that a failure to investigate cannot be significant if there was no time to investigate.

plaintiff (id., at p. 436), reliance upon sources known to be unreliable (Curtis Publishing Co. v. Butts, supra, 388 U.S. 130, 156 [18 L.Ed.2d 1094, 1111]; Pep v. Newsweek, Inc. (S.D.N.Y. 1983) 553 F.Supp. 1000, 1002), or known to be biased against the plaintiff (Fisher v. Larsen (1982) 138 Cal.App.3d 627, 640 [188 Cal.Rptr. 216]; Burns v. McGraw-Hill Broadcasting Co., Inc. (Colo. 1983) 659 P.2d 1351, 1361-1362) -- such factors may, in an appropriate case, indicate that the publisher himself had serious doubts regarding the truth of his publication.

We emphasize that such evidence is relevant only to the extent that it reflects on the subjective attitude of the publisher. (St. Amant v. Thompson, supra, 390 U.S. 727, 732-733 [20 L.Ed.2d 262, 268]; Pep v. Newsweek, Inc., supra, 553 F.Supp. 1000, 1003; Velle Transcendental

Research Ass'n v. Sanders (C.D.Cal. 1981) 518 F.Supp. 512, 518-519.) The failure to conduct a thorough and objective investigation, standing alone, does not prove actual malice, nor even necessarily raise a triable issue of fact on that controversy. (See St. Amant v. Thompson, supra, 390 U.S. 727, 733 [20 L.Ed.2d 262, 268]; Beckley Newspapers v. Hanks (1967) 389 U.S. 81, 84-85 [19 L.Ed.2d 248, 252, 88 S.Ct. 197].) Similarly, mere proof of ill will on the part of the publisher may likewise be insufficient. (Gomes v. Fried (1982) 136 Cal.App.3d 924, 934-935 [186 Cal.Rptr. 605].)

Upon examining the record before us, we find no triable issue as to actual malice. There is no direct evidence that MacDonald or other Reader's Digest personnel believed the questioned passages in the article were false, or even entertained serious doubts respecting

their truth. Reader's Digest relied primarily upon the writings and conversations with Professor Ofshe and the Mitchells. Dr. Ofshe is a professor of sociology at a leading university and the author of a number of studies on Synanon; the Mitchells received the Pulitzer Prize for their reports and editorials on Synanon. Plaintiffs questioned the objectivity of these sources, and the extent of their knowledge of Synanon, but do not question that Reader's Digest considered them to be persons of unsullied reputation./10

In this setting, Reader's Digest's failure to contact Synanon or to conduct

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10/ Compare Curtis Publishing Co. v. Butts, supra, 388 U.S. 130 (reliance without corroboration upon man on criminal probation who claimed to have overheard a telephone call); Pep v. Newsweek, Inc., supra, 553 F.Supp. 1000 (reliance upon source reputed to be a compulsive gambler, a swindler and a liar).

an objective investigation is relatively inconsequential. A publisher does not have to investigate personally, but may rely on the investigation and conclusions of reputable sources. "Where the publication comes from a known reliable source and there is nothing in the circumstances to suggest inaccuracy, there is no duty to investigate." (Bindrim v. Mitchell (1979) 92 Cal.App.3d 61, 73 [155 Cal.Rptr. 29]; see Brewer v. Memphis Pub. Co., Inc. (5th Cir. 1980) 626 F.2d 1238; Vandenburg v. Newsweek, Inc. (5th Cir. 1975) 507 F.2d 1024, 1028; Barger v. Playboy Enterprises, Inc., supra, 564 F.Supp. 1151, 1157; Trans World Accounts, Inc. v. Associated Press (N.D.Cal. 1977) 425 F.Supp. 814, 822; Martin Marietta Corp. v. Evening Star Newspaper (D.D.C. 1976) 417 F.Supp. 947, 958-959; cf. Velle Transcendental Research Ass'n v. Sanders, supra, 518 F.Supp. 512, 518-519 [reliance

on sources of doubtful reputation but corroborated each other].)/11

Neither is there a duty to write an objective account. A publisher is "not required to provide an objective picture (New York Times Company v. Connor (5th Cir. 1966) 365 F.2d 567, 576) or an accurate one [citing Time, Inc. v. Pape (1971) 401 U.S. 279 (28 L.Ed.2d 45, 91 S.Ct. 633)]" (Gomes v. Fried, supra, 136 Cal.App.3d 924, 934). So long as he has

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11/ The superior court, in finding a triable issue of fact as to Reader's Digest's alleged reckless disregard of the truth, quoted Goldwater v. Ginzburg, supra, 414 F.2d 324, 343, where the court stated that "[r]ecklessness is, after all, only negligence raised to a higher power." (Accord, Fisher v. Larsen, supra, 138 Cal.App.3d 627, 640.) That language in the context of the New York Times standard is somewhat misleading. "Reckless disregard of the truth," as defined in St. Amant v. Thompson, supra, 390 U.S. 727, does not mean gross or even extreme negligence, but requires actual doubt concerning the truth of the publication.

no serious doubts concerning its truth, he can present but one side of the story. (Vandenburg v. Newsweek, Inc., supra, 507 F.2d 1024, 1028.) The Reader's Digest could properly tell the story of how the Mitchells won the Pulitzer Prize, and in that story reflect the Mitchells' views on Synanon, without also presenting Synanon's side of the picture. Fair and objective reporting may be a worthy ideal, but there is also room, within the protection of the First Amendment, for writing which seeks to expose wrongdoing and arouse righteous anger; clearly such writing is typically less than objective in its presentation.

Synanon argues that Reader's Digest's knowledge that Synanon had already sued Dr. Ofshe and the Mitchells for libel should have led Reader's Digest to require independent corroboration of the statements from these sources. It

also maintains that when Reader's Digest received a demand for retraction before it published certain foreign language editions of the article, it was then on notice of the need for further investigation. (See Bindrim v. Mitchell, supra, 92 Cal.App.3d 61, 74.)

Both arguments assume that the threat or filing of a libel action should cause a publisher to have serious doubts about the truth of its story and the truthfulness of its sources. But Reader's Digest was aware that, as reported in MacDonald's article, "Synanon's 40-member legal department often used the courts to silence articles and block efforts at governmental control." A National News Council report described Synanon as using litigation "for coercing the press into silence about Synanon and its affairs," and the Pulitzer Prize Committee, in awarding the prize to the Mitchells,

praised their refusal to yield to threats of lawsuits. The threat of a libel suit by Synanon might well give a publisher pause, but it would not necessarily lead it to doubt the truthfulness of its article or its sources.

Plaintiffs point to a letter written by MacDonald a year before the article was published, in which he wrote: "For what started as a do-good organization, I must say Synanon seems very, very nasty indeed, and litigious as hell." They suggest that this letter proves that MacDonald was biased against them. At the time he wrote the letter, however, MacDonald was well into the preparation of his article; he was aware of Synanon's hoarding of arms, the assaults upon former members, the burning of the house of a former member, the rattlesnake attack on Attorney Morantz, and of Synanon's numerous lawsuits. His

letter seems a reasonable reaction to what he had learned in preparing to write the article, and does not indicate a state of mind that would suggest that he had serious doubts about the article's veracity.

Plaintiffs also point out that one of the Reader's Digest editors deleted the phrase "one time heroin user" from a description of Jack Hurst, a Synanon director, and made the marginal notation "credibility -- of rehabilitation program!" Plaintiffs infer from this cryptic comment that the editor was unwilling for the article to acknowledge that even one former drug user had been rehabilitated by Synanon. But under the St. Amant standard, the nonobjectivity of the editor is not the issue. To show actual malice, plaintiffs would have to draw the inference that the editor's knowledge of Hurst's rehabilitation led

him to doubt the truth of the article's statements that after 1968 Synanon's rehabilitation program was minimal. This is a dubious inference at best; moreover, with the Hurst deletion as the strongest evidence we have found in the record to support plaintiffs' position, we conclude that a trier of fact could not find clear and convincing evidence of actual malice./12

12/ Plaintiffs raise two other matters. First, they assert that the Reader's Digest Editorial Research Manual admonishes researchers to "begin with available Digest Sources," but that MacDonald ignored two Reader's Digest articles published in 1970 which praised Synanon's rehabilitation program. Both articles were primarily concerned with the Synanon program of the 1960's, and do not substantially contradict MacDonald's thesis that Synanon has changed since 1968, and that drug rehabilitation is now minimal.

Plaintiffs also suggest that MacDonald's notes of a conversation with Dr. Ofshe show that he was aware of Synanon's continued drug rehabilitation program. The notes read: "Undeserved rep. as miracle drug cure . . . 1,000 a year coming in. Far more successful in business than in rehab." Those notes

(Continued on next page)

Plaintiffs further rely, however, on the argument that the Reader's Digest article factually departs from the statements and information furnished by Ofshe and the Mitchells. Such a contention squarely raises the question of the extent to which the New York Times standard of actual malice permits the exercise of "literary license."

The language of New York Times itself clearly implies that all publications must necessarily be permitted some degree of flexibility in their choice of the proper words and phrases to

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(Footnote 12 continued)
show only that MacDonald was aware of about 1,000 persons entering the program a year, but that Dr. Ofshe did not consider the program very successful. The article did not say that Synanon had no drug rehabilitation program, but only that its program was "minimal." An unsuccessful program which attempts to treat 1,000 persons a year, carried on by an organization which invests the greater part of its energy in other matters, could be characterized as a "minimal" program.

describe the subject at issue: "[E]rroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" (New York Times, supra, 376 U.S. at pp. 271-272 [11 L.Ed. at p. 701], citation omitted.) Further, the United States Supreme Court has reaffirmed this concept in several more recent decisions. "Realistically, . . . some error is inevitable; and the difficulties of separating fact from fiction convinced the court in New York Times, Butts, Gertz, and similar cases to limit liability to instances where some degree of culpability is present in order to eliminate the risk of undue self-censorship and the suppression of truthful material." (Herbert v. Lando (1979) 441 U.S. 153, 171-172 [60 L.Ed.2d 115, 131, 99 S.Ct. 1635].)

In its very recent decision on this same issue, the United States Supreme Court clearly recognized the need for a certain degree of literary license when properly applying the New York Times standard to the facts of each case. In Bose Corp. v. Consumer's Union, supra, ___ U.S. ___ [80 L.Ed.2d 502], the alleged defamatory material consisted of a statement in Consumer Reports magazine that the musical sound projected by Bose's speakers tended to wander "about the room." Plaintiff corporation argued that the sound in fact tended to wander "along the wall" and introduced the testimony of the engineer who performed the evaluation for defendant magazine in order to corroborate this latter interpretation. The United States Supreme Court rejected plaintiff's argument that such a choice of words constituted defamation and approved the author's choice of words as a valid

exercise of literary license. They characterized the magazine's adoption of the particular phrase "about the room" as "'one of a number of possible rational interpretations' of an event 'that bristled with ambiguities' and descriptive challenges for the writer. [Citation.] The choice of such language, though reflecting a misconception, does not place the speech beyond the outer limits of the First Amendment's broad protective umbrella . . . . The statement in this case represents the sort of inaccuracy that is commonplace in the forum of robust debate to which the New York Times rule applies. [Citing Time, Inc. v. Pape (1970) 401 U.S. 279, 290-292 (28 L.Ed.2d 45, 53-54, 91 S.Ct. 633).]" (Bose Corp. v. Consumer's Union, supra, ___ U.S. ____, ____ [80 L.Ed.2d at p. 525].)/13

13/ Although California courts have never directly addressed this

(Continued on next page)

(Footnote 13 continued)
concept of literary license, there is an appropriate analogy in the "fair report" privilege. Civil Code section 47, subdivision 4, provides that a privileged publication is one made by a "fair and true report" of various official proceedings. Several cases have been decided under this statute, and all permit a certain degree of flexibility/ literary license in defining "fair report." "'It is well settled that a defendant is not required in an action of libel to justify every word of the alleged defamatory matter; it is sufficient if the substance, the gist, the sting of the libelous charge be justified. . . .'" (Hayward v. Watsonville Register-Pajaronian & Sun (1968) 265 Cal.App.2d 255, 262 [71 Cal.Rptr. 295], citing Kurata v. Los Angeles News Pub. Co. (1935) 4 Cal.App.2d 224 [40 P.2d 520].)

Similarly, the court in Handelsman v. San Francisco Chronicle (1970) 11 Cal.App.3d 381 [90 Cal.Rptr. 188] pursued the definition of "fair and true." There, defendant newspaper published an account of a civil lawsuit filed against the plaintiff which was "translated" by the writer, who characterized the allegation of civil conversion as "outright theft." The court also cited Kurata, supra, 4 Cal.App.2d at pages 227-228: "'"If the substantial imputations be proved true, a slight inaccuracy in the details will not prevent a judgment for the defendant, if the inaccuracy does not change the complexion of the affair so as to affect the reader of the article differently

(Continued on next page)

The allegedly defamatory statements in the instant case provide similarly apposite examples of the importance of literary license to a competent and free press. The two sentences which Synanon has claimed to be particularly defamatory focus on the phrase that the foundation's "spectacular claims of success were never proved," and the statement that "[s]ince 1968, minimal drug rehabilitation work had been attempted; funds, however, were still solicited on that basis." Synanon contends that neither of these two statements finds any support in Reader's Digest's research and specifically in the interviews with the Mitchells and Professor Ofshe. However, if we permit Reader's Digest a reasonable degree of flexibility in its choice of language,

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(Footnote 13 continued)
than the actual truth would."'"
(Handelsman, supra, 11 Cal.App.3d at p. 387.)

Synanon's claims fail on both counts.

Regarding the statement that Synanon's "spectacular claims of success were never proved," the record reveals that documentary sources available to the defendants reported that numerous claims of high success rates had been made by or attributed to Synanon and Dederich. These included a claimed cure rate for addicts of up to 90 percent. There was no evidence that Synanon or Dederich had ever disclaimed these reports. Indeed, Synanon's own publications boasted that the foundation was "the world's foremost authority on curing drug addiction," and that its "cure rate is 100%." Synanon's own publicity release stated that it had "helped some 40,000 drug addicts, alcoholics and juvenile delinquents" and is "the grandfather of over 3,000 American self-help programs." Dederich himself asserted that he "personally helped

hundreds, and possibly thousands, of people," and that Synanon's rehabilitation rate was and is "totally miraculous."

The record also reveals that plaintiffs themselves have on occasion acknowledged that there is no basis for such claims of success. Indeed, Dederich personally stated, "Our statistics are utterly ridiculous. One in thirty stayed . . . . We don't call ourselves any kind of rehab place . . . . We're just lying." Equally as important, despite Synanon's assertions to the contrary, it is clear that both the Mitchells and Dr. Ofshe believed that many of Synanon's claims were, at the very least, exaggerated. Plaintiffs draw attention to the fact that David Mitchell was unwilling in deposition to use the precise term "spectacular" when describing Synanon's claims of success, but there is much evidence in the record

which indicates the Mitchells' grave doubts about many of Synanon's broad claims. In a similar vein, although Synanon contends that Dr. Ofshe never made that exact statement either, their own "expert" analysis of Dr. Ofshe's statements are in accord with defendants' interpretation. For example, they stated "the thrust of [Ofshe's] paper is that Synanon never achieved the degree of successful drug rehabilitation that it claimed or that outsiders believed . . . Ofshe . . . sees the whole history of Synanon as a failure to cure addicts."

It is readily apparent that both Synanon and Reader's Digest correctly interpreted Dr. Ofshe's study and its conclusion about Synanon's claims of success. In fact, the study at one point concluded, "No rigorous research has ever shown Synanon's approach worked any better than dozens of other drug programs . . . .

What set Synanon apart from all other programs was not success but public relations." When this study and many of Synanon's and Dederich's own statements are examined, it becomes clear that Reader's Digest's statement regarding "spectacular" claims of success which were unproven draws support from a fairly wide sampling of evidence. When this evidence is considered in the important context of an author's right to choose appropriate words and phrases, Synanon's quibbling over the use of the word "spectacular" in no way constitutes a legitimate showing of defamation. A fair reading of all the material which was available to Reader's Digest and author MacDonald at the time the article was written clearly suggests that the description of Synanon's success claims as "spectacular" and "never proved" falls within an acceptable range of literary license.

In like manner, Reader's Digest's statement that since 1968 minimal drug rehabilitation work had been attempted, though funds were still solicited on that basis, also seems well within the range of appropriate literary license. Synanon emphasizes that none of MacDonald's sources offer any figures as to the extent of Synanon's rehabilitative program during the 1970's. They argue, in effect, that a program which has been deemphasized and assigned secondary status might still be more than "minimal." However, strong evidence indicates that this characterization was not only adequately supported by Reader's Digest's sources but also an accurate appraisal of reality.

Once again, Synanon and Dederich's <u>own</u> statements about the changing nature of the organization lend significant support to the author's assertion./<u>14</u>

<u>14</u>/ For just one example,
(Continued on next page)

In addition to this source of confirmation, David Mitchell, who had investigated the Synanon operation for several years, confirmed in his deposition testimony that he advised the defendants that the article accurately reported Synanon's activities and conduct. This was in accord with information which

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(Footnote 14 continued)
Reader's Digest obtained through discovery a tape recording of a 1977 speech by Dederich to Synanon members in which he says: "We are not . . . a rehabilitation place for dope fiends. We're, we're not. We stopped being that a long, long time ago. Very, very little of our energy goes into that situation. Almost none . . . . That notion is ten to twelve years old, that we are somehow a rehab place for dope fiends. We don't rehab dope fiends. They don't stay. We've been out of that business for a long time."

Reader's Digest does not claim that MacDonald relied on this tape recording in writing his article. The recording nevertheless lends support to our conclusion that MacDonald's characterization of Synanon's program during the 1970's as "minimal" is not an act of reckless disregard of the truth and in fact is quite an appropriate characterization.

Mitchell had received from his own sources that "very little of [Synanon's] activities were involved in curing addicts. It was still going on, but it was a small part of the overall activities of Synanon." Moreover, on reviewing the draft of the Reader's Digest article, David Mitchell himself suggested that the word "minimal" be employed, indicating that it was preferable to "very little."

Dr. Ofshe also had stated in several of his writings that the drug rehabilitation activities had been greatly deemphasized after 1968, leaving what was only a "small scale" program. This conclusion is supported by a variety of other evidence in the record, and Synanon again appears to be merely quibbling with the author's choice of words. Given the importance of permitting a reasonable degree of literary license, the statement in question seems easily supportable and

by no means an act in reckless disregard of the truth./15

IV. Plaintiffs' Other Causes of Action.

Although the parties concentrated their argument on the asserted cause of action for libel, plaintiffs' second amended complaint set forth several additional causes of action. These

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15/ Plaintiffs suggest that summary judgment should be denied to permit them to conduct further discovery. Plaintiffs have already deposed Dr. Ofshe, David Mitchell, David MacDonald and Heather Chapman (the Reader's Digest research editor). They have served and received responses to four sets of interrogatories and four sets of requests for documents. Their request for additional discovery suggests no specific persons or documents to be examined, but merely notes that "many editors and other individuals involved with the subject article have not yet been deposed." The possibility that plaintiffs will uncover clear and convincing evidence of actual malice by deposing various unnamed persons peripherally involved in the Reader's Digest editorial process is remote, and does not justify this court's abstaining from a decision on the merits of the summary judgment motion.

included claims for intentional infliction of emotional distress, invasion of privacy by placing plaintiffs in a "false light," and invasion of privacy by intrusion in plaintiffs' private affairs. Each of these additional causes of action are based upon the same facts as the cause of action for libel. Our conclusion that plaintiffs have failed to show a triable issue of fact as to actual malice requires summary judgment on every claim based upon the publication of the Reader's Digest article.

The New York Times decision defined a zone of constitutional protection within which one could publish concerning a public figure without fear of liability. That constitutional protection does not depend on the label given the stated cause of action (see New York Times Co. v. Sullivan, supra, 376 U.S. 254, 269 [11 L.Ed.2d 686, 700]); it bars not only

actions for defamation, but also claims for invasion of privacy (Time, Inc. v. Hill (1967) 385 U.S. 374, 387-388 [17 L.Ed.2d 456, 467, 87 S.Ct. 534]; Goldman v. Time, Inc. (N.D.Cal. 1971) 336 F.Supp. 133, 137-138; Kapellas v. Kofman (1969) 1 Cal.3d 20, 35 fn. 16 [81 Cal.Rptr. 360, 459 P.2d 912]). Dederich's cause of action for intentional infliction of emotional distress presents an issue of first impression, but fails for the same reason as his causes of action for defamation and privacy: liability cannot be imposed on any theory for what has been determined to be a constitutionally protected publication.

V. Conclusion.

The Reader's Digest article described Synanon as an organization which, under Dederich's leadership, had eventually adopted and carried out a policy of violence and intimidation. It

is replete with statements referring to serious crimes, including attempted murder. The present lawsuit, however, ignores most of those charges, and instead quibbles about the wording of what would appear to be three of the more innocuous sentences in the article./16

One sentence asserted that Dederich's "spectacular claims of success were never proved . . . ." Synanon's own statements, as well as Reader's Digest's sources, indicate that plaintiffs claimed an extraordinary rate of success at rehabilitating drug addicts; plaintiffs merely deny that the claims themselves were "spectacular." Reader's Digest said

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16/ Compare Cervantes v. Time, Inc., supra, 464 F.2d 986, in which plaintiff, the Mayor of St. Louis, challenged only four paragraphs of an eighty-seven paragraph article charging that plaintiff had business relationships with criminal organizations in the city. The decision affirmed a summary judgment for the defendant.

that since 1968 "minimal drug rehabilitation work had been attempted"; plaintiffs admit that since 1968 Synanon's drug rehabilitation program has been deemphasized, and that it is now secondary to the main purposes of the organization, but argue only that even a deemphasized program may possibly be more than "minimal." Reader's Digest said Synanon still solicits funds for its drug rehabilitation program; plaintiffs respond only that Synanon also solicits funds for other purposes.

None of the alleged defamatory statements goes beyond what a responsible staff writer might draft on the basis of the information provided him by his sources. The sources themselves were persons of good, indeed distinguished, reputation. There is nothing at all in the record to suggest that MacDonald or anyone else at the Reader's Digest had any

serious doubt as to the reliability of the sources or the truth of the challenged statements.

Since we conclude that the record reveals no clear and convincing evidence of "actual malice," as that term is defined in the controlling decisions of the United States Supreme Court, and thus fails to raise a triable issue of fact, summary judgment should therefore have been entered in favor of codefendants David MacDonald and the Reader's Digest. Let a peremptory writ of mandate issue directing the trial court to vacate its order denying petitioners' motion for summary judgment and to enter its order granting the motion.

Mosk, J., Kaus, J., Reynoso, J., Grodin, J., Lucas, J., Rouse, J.* concurred.

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* Assigned by the Acting Chairperson of the Judicial Council.

APPENDIX B - Order of the California Court of Appeal, First Appellate District, Division Three Dated November 15, 1983

Court of Appeal of the State of California

IN AND FOR THE

First Appellate District

Division Three

Reader's Digest Association, et al.,	
Petitioners,	No. A023474
vs.	Marin Superior Court No. 107931
Superior Court, County of Marin,	
Respondent,	
The Synanon Church, et al.,	
Real Parties in Interest.	

BY THE COURT:

The petition for writ of mandate is denied. (White, P. J., Feinberg, J. and Barry-Deal, J. participated in the decision.)

Dated: Nov 15, 1983

WHITE, P.J.

APPENDIX C - Order of the Superior Court of Marin County re Motion for Reconsideration Dated May 23, 1983

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MARIN

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THE SYNANON CHURCH and CHARLES E. DEDERICH, Plaintiffs, -vs- READERS DIGEST ASSOCIATION, INC, et al., Defendants.	)	No: 107931 108266

MINUTE ORDER RULING ON APPLICATION BY READERS DIGEST ASSOCIATION, INC. AND DAVID MAC DONALD TO RECONSIDER ORDER DATED MARCH 15, 1983, DENYING MOTION FOR SUMMARY JUDGMENT, etc.

This court has previously ruled that the statements complained of in this action are reasonably susceptible to a libelous interpretation; i.e., Synanon was not successful in its rehabilitative

efforts, Synanon has abandoned its rehabilitative purpose, and funds were solicited on a fraudulent basis.

Merely determining that the statements may be interpreted to be libelous does not dispose of the application by Readers Digest Association, Inc. and David Mac Donald for the Court to reconsider its order of March 15th, 1983, denying their motion for summary judgment. In order to recover for libel, public figures must prove that the defendant acted with actual knowledge of falsity or reckless disregard for the truth. New York Times Co. vs. Sullivan, 376 U.S. 254.

Synanon and Mr. Dederich are public figures, and there is no triable issue of fact in that regard. Also, there is no triable issue of fact as to whether the Movants had actual knowledge of the falsity of their publication. They did not.

Reckless conduct is not measured by whether a reasonably prudent man would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant, in fact, subjectively entertained serious doubts as to the truth of his publication. Gomes v. Fried, 136 Cal App 3d 924; Weingarten v. Block (1980) 102 Cal App 3d 129; Belli v. Curtis Publishing Company, 25 Cal App 3d 384.

Also, recklessness cannot be established by a mere showing that the reporting was speculative or sloppy. Gomes v. Fried, Supra, Page 934-935.

Issue finding, rather than issue determination, is the pivot upon which summary judgment law turns. 4 Witkins California Procedure, second edition, Page 2840. As stated in Fisher v. Larsen, 138 Cal App 3d 627, on Page 634:

> "The summary judgments may be upheld only if the evidence, construed favorably (to the Plaintiffs), raises no triable issue of fact. It is not sufficient the moving declarations, standing alone, would support a defense judgment. The trial court may not weigh the credibility of the declarants nor pass on the merits of the issues presented, and must construe movant's declarations strictly."

In determining whether the papers show that there is no triable issue as to any material fact, the Court is required to consider all inferences reasonably deducible from all of the evidence. If there are conflicting reasonably deducible inferences, the motion for summary judgment must be denied. C.C.P. 437 c(c).

As stated, this Court is of the opinion that there is no triable issue of fact as to whether the Defendants had knowledge of the falsity of the publication. They did not. The real issue here is if they acted in reckless

disregard of the truth. This is not an easy question. There is some evidence of "negligence." However, negligence alone is not sufficient to find recklessness. But, recklessness is negligence raised to a higher power Widner v. Pacific Gas and Electric Co., 75 Cal App 3d 415 on Page 435.

Thus, the issue is if the declarations show that any negligence has been raised to a sufficient degree to become "recklessness." This Court must construe the evidence in favor of the Plaintiffs and construe the Movant's declarations strictly. This Court has concluded that it cannot say as a matter of law that there is no reasonable inference that the Movants acted with reckless disregard of the truth.

Thus, there is a triable issue of fact as to whether the Movants acted "in reckless disregard of the truth."

Therefore, the application by Readers Digest Association, Inc. and David Mac Donald to reconsider the Court's order, dated March 15, 1983, denying their motion for summary judgment is denied.

This Court is of the opinion that the Movant's motion for reconsideration had substantial merit, and an appellate court may well reach a contrary result to this Court. Because of the great time and expense the parties have incurred in discovery thus far, and will incur in the future, all of which will have been incurred unnecessarily if an appellate court arrives at a different conclusion than this court, it is ordered that discovery in this matter is stayed upon timely application by a moving defendant of a petition for a writ of mandate with respect to this Court's decision herein denying reconsideration.

The Movant's request that discovery

be stayed in the related case of Burke v. Readers Digest Association, Inc., et al., is denied, as the other parties in that action have not had an opportunity to litigate any stay order.

DATED: 5/23/83

DM:ls

David Menary, Jr.
DAVID MENARY, JR.
Judge of the Superior Court

APPENDIX D - Order of the Superior Court of Marin County re Motion for Summary Judgment Dated March 15, 1983

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MARIN

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THE SYNANON CHURCH and CHARLES E. DEDERICH,	NO. 107931
Plaintiffs,	MINUTE ORDER RULING ON MOTION FOR SUMMARY JUDGMENT
vs.	
READER'S DIGEST ASSOCIATION, INC., DAVID MACDONALD, DAVID MITCHELL, CATHY MITCHELL, RICHARD OFSHE and DOES I THROUGH 100, inclusive,	
Defendants.	

The motion for summary judgment of defendants Reader's Digest Association, Inc., and David MacDonald, filed herein August 23, 1982, is denied.

Dated: March 15, 1983

David Menary, Jr.
David Menary, Jr.
Judge of the Superior Court

APPENDIX E

ASSERTIONS BY READER'S DIGEST CONTRADICTED BY OFSHE & MITCHELL WHICH CREATE A TRIABLE QUESTION OF FACT OF ACTUAL MALICE

ALLEGATIONS BY READER'S DIGEST AND MacDONALD	CONTRADICTIONS BY OFSHE & MITCHELL
(1) Chapman stated in her research notes: "Ofshe says there was no rehabilitation attempted in 1968 and prefers to say that 'much of the organization's energy had been directed towards building a separate society, and growing wealthy.'"	(1)(a) Ofshe testified that he has never said that Synanon was engaged in no drug rehabilitation since 1968. (1)(b) Ofshe testified that he had never said to Chapman that much of Synanon's energy had been directed towards building a separate society and growing wealthy, and, therefore, it was not directing its efforts at drug rehabilitation.

ALLEGATIONS BY READER'S DIGEST AND MacDONALD	CONTRADICTIONS BY OFSHE & MITCHELL
(2) MacDonald and Chapman both claimed that Ofshe was a source for the statement: "Since 1968, minimal drug rehabilitation work had been attempted."	(2)(a) Ofshe testified that he does not believe he has ever said to anyone that Synanon engaged in minimal drug rehabilitation work since 1968. (2)(b) Ofshe testified that he did not believe he told MacDonald that since 1968 little drug rehabilitation had been attempted by Synanon. (2)(c) Ofshe testified that he never made such a statement to Chapman. (2)(d) Ofshe testified that he would characterize Synanon's efforts at drug rehabilitation as a significant percentage of Synanon's activities during 1972 and 1974, the only two years in which he conducted his participant observer research into Synanon.

ALLEGATIONS BY READER'S DIGEST AND MacDONALD	CONTRADICTIONS BY OFSHE & MITCHELL
(3) MacDonald and Chapman both testified that Ofshe was a source for the statement: "funds, however, were still solicited on that basis."	(3)(a) Ofshe testified that he did not state to MacDonald information to the effect that "funds, however, were still solicited on that basis." (3)(b) Ofshe testified that he had no recollection of ever telling such information to Chapman.

ALLEGATIONS BY READER'S DIGEST AND MacDONALD	CONTRADICTIONS BY OFSHE & MITCHELL
(4) MacDonald claimed that Ofshe and Ofshe's two papers, "The Failure that Founded a Tradition" and "Social Development of the Synanon Cult," were the sources for the statement in the article that Mr. Dederich's "spectacular claims of success were never proved."	(4)(a) Ofshe testified that he could not recall any writings that state that Mr. Dederich's claims of success in drug rehabilitation had never been proved nor could he recall ever making such a statement. (4)(b) Ofshe testified that he could not recall ever having told anyone that Synanon had made spectacular claims of success in drug rehabilitation between 1958 and the present. He testified specifically that he never told that information to either MacDonald or Chapman.

ALLEGATIONS BY READER'S DIGEST AND MacDONALD	CONTRADICTIONS BY OFSHE & MITCHELL
(5) MacDonald testified that he had understood from Ofshe that Mr. Dederich had made claims of up to 90% success rate in rehabilitating drug addicts, which information served as the basis for the statement that Mr. Dederich had made spectacular claims of success.	(5)(a) Ofshe testified that he did not believe that his paper, "The Failure That Founded a Tradition," stated that Synanon claimed a 90% success rate in its efforts at drug rehabilitation. (5)(b) Ofshe testified that he could not recall any portion of his paper, "Social Development of the Synanon Cult," where he stated that Synanon claimed a 90% success rate. (5)(c) Ofshe testified that he did not recall ever having stated that Synanon claimed at any time since its founding a 90% success rate in its efforts at drug rehabilitation. (5)(d) In testimony, Ofshe agreed that he had never been asked by MacDonald whether Synanon claimed a 90% success rate in drug rehabilitation.

ALLEGATIONS BY READER'S DIGEST AND MacDONALD	CONTRADICTIONS BY OFSHE & MITCHELL
	(5)(e) Ofshe testified that he could not recall any information he had about Synanon's claims of success at any time between 1970 through 1981.
(6) Chapman states that Ofshe's article, "The Failure That Founded a Tradition," was a source for the statement regarding spectacular claims of success which had never been proven.	(6) Ofshe testified that he could not recall any writings that state that Mr. Dederich's claims of success in drug rehabilitation had never been proved nor could he recall ever making such a statement.
(7) MacDonald and Chapman both state that Mitchell was a source for the statement: "Since 1968, minimal drug rehabilitation work had been attempted."	(7)(a) Mitchell testified that he did not know exactly what percentage of Synanon's efforts were directed toward drug rehabilitation after 1968.

ALLEGATIONS BY READER'S DIGEST AND MacDONALD	CONTRADICTIONS BY OFSHE & MITCHELL
	(7)(b) Mitchell testified that he did not know the numbers of persons who had come into Synanon in any one year. Further, Mitchell testified that he was not sure that he ever knew the percentage of persons who came to Synanon for help with problems such as alcoholism or drug rehabilitation, as compared to those who came to Synanon for other reasons, and Mitchell testified that from his research he thought it was impossible for him to tell that percentage.

ALLEGATIONS BY READER'S DIGEST AND MacDONALD	CONTRADICTIONS BY OFSHE & MITCHELL
(8) In her research notes, after stating that Ofshe had said there had been no rehabilitation attempted in 1968 and that Synanon had directed its energies toward building a separate society and growing wealthy, Chapman states: "Mitchell does not disagree with this but suggests we say 'minimal drug.'"	(8) Mitchell testified that he believes he indicated to Chapman that she could not say that there was "little rehabilitation" since 1968, because the word "little" underplayed the extent of Synanon's drug rehabilitation activities.

ALLEGATIONS BY READER'S DIGEST AND MacDONALD	CONTRADICTIONS BY OFSHE & MITCHELL
(9) MacDonald and Chapman both claim that Mitchell was a source for the statement: "funds, however, were still solicited on that basis."	(9) Mitchell testified that in soliciting funds since 1968, Synanon did not represent that what a person gives to Synanon will only go to rehabilitation of drug addicts. Further, Mitchell testified that he understood that since 1980 Synanon solicited funds not only for drug rehabilitation activities but also for other activities as well.
(10) Chapman stated that she used Mitchell as confirmation for the statement that Mr. Dederich had made spectacular claims of success.	(10) Mitchell testified that he did not and would not say that Synanon's and Mr. Dederich's claims of success in rehabilitation were "spectacular claims."

ALLEGATIONS BY READER'S DIGEST AND MacDONALD	CONTRADICTIONS BY OFSHE & MITCHELL
(11) MacDonald and Chapman both state that they had no reason to doubt the reliability of Ofshe in regard to the defamatory statements.	(11)(a) Ofshe testified that he had no recollection of ever representing himself as an expert on Synanon's drug rehabilitation between the years 1968 and 1978. (11)(b) In his testimony, Ofshe named 8 other persons who had more expertise or experience in the area of rehabilitation than than he did. (11)(c) Ofshe testified that, other than Synanon, he has done no other actual work in the field of drug rehabilitation. (11)(d) Ofshe testified that he gave MacDonald his paper, "Social Development of the Synanon Cult," in order to give MacDonald access to research and references, so that MacDonald could do his own research and not to rely on it as a source.

ALLEGATIONS BY READER'S DIGEST AND MacDONALD	CONTRADICTIONS BY OFSHE & MITCHELL
	(11)(e) Concerning his observations at Synanon, Ofshe testified that (a) he had no data to show the number of people he spoke with about drug rehabilitation at Synanon; (b) he never prepared an outline of the questions he would ask about drug rehabilitation at Synanon; (c) he had no standard questions to ask people about drug rehabilitation efforts; (d) he took no formal interviews of anyone at Synanon; and (e) he never prepared any research design or proposal of research on Synanon.

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No. 84-1304

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

THE SYNANON CHURCH, CHARLES E. DEDERICH,
Petitioners,

vs.

READER'S DIGEST ASSOCIATION, INC.,
DAVID MACDONALD,
Respondents.

On Petition for a Writ of Certiorari to the California Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In a libel case governed by *New York Times Co.* v. *Sullivan,* is summary judgment correctly granted to the defendants when the record, construed in the light most favorable to the plaintiffs, contains no evidence from which a reasonable jury could find "actual malice" (i.e., any knowledge of falsity or an awareness of probable falsity)?

2. Are plaintiffs public figures under *New York Times Co.* v. *Sullivan* when the uncontradicted evidence demonstrates that they engaged in massive publicity efforts to obtain a favorable public reputation for themselves and for their drug rehabilitation efforts, and that they voluntarily injected themselves into public controversy over the effectiveness of their efforts?

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On Petition for a Writ of Certiorari to the California Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioners' statement of the case contains many assertions not supported by, or contrary to, the record. The relevant facts, most of which are summarized in the opinion of the California Supreme Court (Pet.Appx., pp. 1a-7a), are as follows:

Respondents are the publisher and author of an article which appeared in the July 1981 edition of the Reader's Digest (pp. 16-19).[1] The article, entitled *The Little Paper That Dared,* described how a small California weekly newspaper (The Point Reyes Light) won the Pulitzer Prize for a series of articles critical of petitioner Synanon

[1]Unless otherwise indicated, citations are to the Appendix record in the court below.

and its founder-leader, petitioner Dederich (id.).[2] The Pulitzer Committee determined that the newspaper performed "meritorious public service" in its "pioneering expose" of the "quasi-religious, corporate cult" Synanon (p. 603).

Since its founding in 1958, Synanon received enormous publicity as an apparently successful rehabilitation center for drug addicts (e.g., pp. 832-934, 945-1016, 1136-1137, 1140-1144, 1148-1156, 1189, 1199-1483). Respondents' article recounted Synanon's history and discussed its transformation into an "alternative life-style community" (p. 18). It also reported Synanon's adoption of a policy of physical violence to intimidate its perceived enemies (pp. 18-19). Specific examples were cited: an assault on a former member when he returned to visit the Synanon facilities, a similar attack on another member who left Synanon when he refused petitioner Dederich's orders to have a vasectomy, Synanon's purchase of $62,000 of guns and ammunition to arm a private police force, Synanon's formation of a squad of "Imperial Marines" to intimidate Synanon foes, and Synanon's attack on an attorney, Paul Morantz, who was bitten by a rattlesnake placed in his mailbox by two Synanon Imperial Marines after his successful prosecution of a lawsuit against Synanon (id.). Petitioner Dederich and the two Synanon Imperial Marines were charged with and convicted of conspiracy to commit murder (pp. 721-732); petitioner Dederich remains on probation in relation to that crime.

Petitioners sued respondents for libel, but they did not challenge any of the serious charges of misconduct described above. Rather, they challenged only the following three sentences in the article:

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[2]Copies of the article have been lodged with the Clerk of the Court.

> "Synanon was founded in 1958 by Charles Dederich, a reformed alcoholic, to rehabilitate drug addicts. Though his spectacular claims of success were never proved, Dederich and Synanon attracted wide publicity and enough cash donations to start a string of addiction centers.
>
> • • • • •
>
> "Since 1968, minimal drug rehabilitation work had been attempted; funds, however, were still solicited on that basis" (p. 4).

Petitioners assert that these sentences are "uniquely defamatory" to their "reputations and incomes" because they affect their ability to solicit funds from the public (Pet., pp. 4-5).[3]

Respondents moved for summary judgment on the ground that petitioners were public figures and that, under this Court's decision in *New York Times Co.* v. *Sullivan* (1964) 376 U.S. 254, there was no evidence of "actual malice," that is, publication with actual knowledge of falsity or a high degree of subjective awareness of probable falsity.[4] Although the trial court viewed the issue as "close," it denied the motion (Pet.Appx., p. 6a). The California Supreme Court granted review and, after an extensive review of the law and the evidence, it concluded that:

> "None of the alleged defamatory statements goes beyond what a responsible staff writer might draft on the basis of the information provided him by his sources. The sources themselves were persons of good, indeed distinguished, reputation. There is nothing at

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[3]Contrary to petitioners' assertion (Pet., p. 5, n. 3), their complaint raised no issues and made no allegations regarding any other portions of the article (see pp. 1-13).

[4]The evidence pertaining to petitioners' claims of "actual malice" is discussed in the argument which follows (infra, pp. 8-13).

all in the record to suggest that MacDonald or anyone else at the Reader's Digest had any serious doubt as to the reliability of the sources or the truth of the challenged statements" (Pet.Appx., pp. 59a-60a).

The court ordered that judgment be entered in favor of respondents.

ARGUMENT

I. THE DECISION OF THE CALIFORNIA SUPREME COURT IS IN ACCORD WITH DECISIONS OF THIS COURT, THE FEDERAL COURTS OF APPEAL AND THE STATE COURTS, ALL OF WHICH AGREE THAT SUMMARY JUDGMENT SHOULD NOT BE GRANTED IF THERE EXISTS A TRIABLE ISSUE OF FACT.

A. The California court expressly recognized that all inferences should be resolved in favor of the party opposing the motion for summary judgment; it did not weigh the evidence, evaluate credibility nor resolve factual questions.

The fundamental premise which underlies the petition—that the California Supreme Court enunciated "an unprecedented and virtually insurmountable barrier to a libel plaintiff" (Pet., p. 10)—is false. Contrary to petitioners' assertions, the California court expressly recognized that "• • • summary disposition is *not* appropriate if a triable issue of fact exists" (Pet.Appx., p. 8a) (emphasis added). Further, the California court quoted with approval from the Fifth Circuit's opinion in *Rebozo* v. *Washington Post Co.* (5 Cir. 1981) 637 F.2d 375:

> "'[T]he standard of review of First Amendment defamation actions, *as in all summary judgment cases*, is whether the record, *construed in a light most favorable to the party against whom the judgment has been entered*, demonstrates there are genuine issues of fact which, if proven, would support a jury verdict for that party'" (Pet.Appx., p. 11a) (emphasis added).

Hence, there is utterly no basis for petitioners' claims that the decision below departs from the procedural rules governing summary judgment motions.

B. The decision of the California Supreme Court is in accord with other decisions reviewing summary judgments in First Amendment libel cases.

In declining to grant "special *procedural* protections to defendants in libel and defamation actions," this Court has emphasized that "the potential chill on protected First Amendment activity * * * is already taken into account in the constitutional limitations on the *substantive* laws governing such suits" (*Calder* v. *Jones* (1984 ..... U.S. ....., 104 S.Ct. 1482, 1488) (emphasis added). The California court's decision follows this Court's ruling; it recognizes that no special procedural rules exist in First Amendment libel cases (supra, pp. 4-5), and it enforces the substantive law governing such suits. Referring to the "potential chilling effect from protracted litigation," the court below cautioned:

> "That does not mean, however, that a court should grant summary judgment when there is a triable issue of fact as to actual malice. Instead, courts may give effect to these concerns regarding a potential chilling effect by finding no triable issues unless it appears that actual malice may be proved at trial by clear and convincing evidence" (Pet.Appx., p. 12a).

This ruling is in accord with opinions of federal and state courts, *including* those (cited at Pet., p. 15) in which petitioners purport to find a "conflict." For example, the Second Circuit has declared that:

> "[A] judge in denying a defendant's summary judgment motion must conclude that, based on the evidence asserted in the plaintiff's affidavits, 'a reasonable jury

> could find malice with convincing clarity' " (*Yiamouyiannis* v. *Consumers U. of United States* (2 Cir. 1980) 619 F.2d 932, 940) (emphasis deleted).

To the same effect: *Rebozo* v. *Washington Post Co.* (5 Cir. 1981) 637 F.2d 375, 381, certiorari denied (1981), 454 U.S. 964; *Guam Federation of Teachers, Local 1581, A.F.T.* v. *Ysrael* (9 Cir. 1974) 492 F.2d 438, 441, certiorari denied (1974) 419 U.S. 872; *Schultz* v. *Newsweek, Inc.* (6 Cir. 1982) 668 F.2d 911, 917; *Beamer* v. *Nishiki* (Haw. 1983) 670 P.2d 1264, 1273.

Hence, the courts generally *agree* with respect to the procedural and the substantive constitutional law to be applied in summary judgment proceedings. Petitioners, however, make much of the California court's reference to "favored remedy" (see Pet., pp. 10, 14-15), but they ignore the context of that reference. The court first observed that, "It is pointless to declare in the abstract that summary judgment is a favored or disfavored remedy" (Pet.Appx., pp. 10a-11a). Then, after holding that the substantive law governing defamation actions under the *New York Times* rule should apply in summary judgment proceedings, the court noted that, "*To this extent,* therefore, summary judgment remains a 'favored' remedy" (emphasis added) (Pet.Appx., p. 13a). Thus, the opinion below is clear in its holding that no special procedural remedies exist.[5]

Petitioners also rely upon the recent decision in *Liberty Lobby, Inc.* v. *Anderson* (D.C.Cir. 1984) 746 F.2d 1563 (see Pet., pp. 12-14), but that case presents no real conflict with the decision below. There, the Court of Appeals—like the California court—conducted an extensive review of the evidence pertaining to actual malice. While conclud-

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[5]If there can be said to be any disagreement here, it is in dicta on terminology as to denominating application of the substantive constitutional law as a "neutral" approach (*Yiamouyiannis* v. *Consumers U. of United States* (2 Cir. 1980) 619 F.2d 932, 940) or a "favored" one ("to this extent").

ing that triable issues of fact existed as to a few of the actual malice allegations (746 F.2d 1577-1579), it affirmed the grant of summary judgment as to a large number of those allegations (746 F.2d 1575-1577).

Although petitioners seize upon the *Liberty Lobby* court's dictum that the "clear and convincing" test is not applicable at the summary judgment stage (see 746 F.2d 1570-1571), that dictum presents no issue here. In recognizing that other courts have concluded that the "clear and convincing" standard does apply at the summary judgment stage, the *Liberty Lobby* court stated: "[T]hose courts' analyses of the facts demonstrate that they rested their decisions upon lack of evidence of malice, not upon lack of 'convincing clarity' in that evidence" (746 F.2d 1571). That is precisely the conclusion reached by the California Supreme Court after its thorough review of the evidence in this case:

> "There is *nothing at all* in the record to suggest that [author] MacDonald or anyone else at the Reader's Digest had any serious doubt as to the reliability of the sources or the truth of the challenged statements" (Pet.Appx., pp. 59a-60a) (emphasis added).

As the review of the evidence in the following section demonstrates, that conclusion is correct. Therefore, the result in this case would not differ whether or not the constitutionally-required "clear and convincing" evidence standard is applied at the summary judgment stage.[6]

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[6]With respect to the question whether the "clear and convincing" standard applies on a motion for summary judgment, the *Liberty Lobby* court misread this Court's decision in *Bose Corp.* v. *Consumers Union of U.S., Inc.* (1984) ... U.S. ..., 104 S.Ct. 1949. The *Liberty Lobby* opinion states that, under *Bose*,

> "[J]udges are not merely to determine whether the finder of fact could reasonably find such 'convincing clarity' to exist, but are 'independently [to] decide' that point" (746 F.2d 1570).

The court concluded that, therefore, a plaintiff would be forced to "try his entire case" on a motion for summary judgment (746 F.2d

II. THERE IS NO EVIDENCE OF ACTUAL KNOWLEDGE OF FALSITY OR A HIGH DEGREE OF AWARENESS OF PROBABLE FALSITY.

A. The California Supreme Court correctly determined that none of petitioners' purported evidence, whether viewed individually or cumulatively, could support a finding of actual malice.

Contrary to petitioners' assertions (Pet., pp. 17-18), the California court expressly recognized that:

> "[A]ctual malice can be proved by circumstantial evidence. '[E]vidence of negligence, of motive and of intent may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity'" (Pet.Appx., pp. 30a-31a).

The California court stressed (Pet.Appx., p. 32a), in accord with this Court's rulings, that evidence of actual malice must bear upon the subjective attitude of the defendant; it must permit the conclusion that "the defendant in fact entertained serious doubts as to the truth of his publication" (*St. Amant* v. *Thompson* (1968) 390 U.S. 727, 731). Because none of petitioners' purported evidence, considered individually or cumulatively, indicated any such subjective awareness of falsity, the court correctly concluded that summary judgment should be granted.[7]

1570). But the *Liberty Lobby* court's concern is unfounded. Under *Bose*, judges must determine whether the evidence is *constitutionally sufficient to support a finding of actual malice;* this does not involve any weighing or reweighing of the evidence (... U.S. ..., 104 S.Ct. 1965). A libel plaintiff need not marshall all his evidence in opposing summary judgment, but rather he is required to bring forth *some* evidence which meets the substantive standard applicable in First Amendment libel cases, i.e., evidence from which a reasonable jury could find malice with convincing clarity.

[7]Petitioners falsely imply that the court below looked only for *direct* evidence of actual malice (Pet., p. 17, n. 12). In fact, after the court concluded that there was *no* such direct evidence (which petitioners do not dispute), it reviewed *all* of petitioners' purported circumstantial evidence (Pet.Appx., pp. 33a-55a).

B. The "evidentiary rules" applied by the court below are in accord with the decisions of other courts.

Petitioners erroneously assert that the California Supreme Court "eliminated" certain classes of evidence "as probative of actual malice" (Pet., p. 19). However, the Court merely concluded that *petitioners'* purported evidence was not sufficient in this case. We discuss each of petitioners' "examples" seriatim:

1. *"Deletion of facts"* (Pet., pp. 19-20): Although a deletion of facts which go to the essence of the claimed libel may be evidence of actual malice, it is evident that deletion of *peripheral* or *irrelevant* material cannot constitute such evidence. Here, the uncontradicted record shows that the deleted phrase to which petitioners refer ("one time heroin user") was irrelevant. When question was raised during the editorial process about deletion of the phrase, the research editor indicated in a marginal note that it was "not necessary p. 196—book" (p. 350). The "book" reference noted by the researcher (p. 660, subpage 196) shows that the "cure" of Mr. Hurst, a former Synanon director who defected, had occurred in 1959. Hence, that "cure" is irrelevant to respondents' report that, "[s]ince *1968*, minimal drug rehabilitation work had been attempted" (p. 18).

2. *Evidence of a "predisposition"* (Pet., p. 20): Petitioners first discuss evidence to which reference was *never made in the court below* (see Pet., pp. 9, 20). In any event, that evidence (an editor's regret that his prior reports on petitioners had not been published) shows no subjective awareness of probable falsity.[8] Further, author MacDon-

[8]Petitioners now claim that they should be entitled to depose this editor and others peripherally involved in the editorial process (Pet., p. 9, n. 8). However, petitioners made no argument before the California Supreme Court about any supposed need to depose specific individuals. Instead, they merely cited a trial court brief. Nor did petitioners avail themselves of the opportunity of filing a petition for rehearing to point out the supposed "error" in this or any other regard (see Pet., p. 22, n. 16).

ald's expression of opinion that "Synanon seems very, very nasty indeed, and litigious as hell" (p. 1618) also is irrelevant (see Pet., pp. 6, 20). As the court below pointed out,

> "At the time he wrote the letter, * * * MacDonald was well into the preparation of his article; he was aware of Synanon's hoarding of arms, the assaults upon former members, the burning of the house of a former member, the rattlesnake attack on Attorney Morantz, and of Synanon's numerous lawsuits" (Pet.Appx., p. 39a).

Notably, petitioners do not and cannot deny either that the cited events occurred or that the author was aware of them. His reaction does not suggest any doubt about the article's truth.[9]

The cases cited by petitioners in this regard (Pet., p. 20) are inapposite. They simply hold that evidence of a preconceived plan to attack the plaintiff may be admissible to show actual malice when coupled with other evidence of a subjective state of mind. Thus, for example, a plan to publish "muckraking" exposes, accompanied by knowledge that the sole source is dishonest, may show actual malice (see *Curtis Publishing Co.* v. *Butts* (1967) 388 U.S. 130, 157, 169). No such evidence exists here.

3. *"Failures in investigation, including refusal to contact subject"* (Pet., pp. 21-22): The law is clear that a failure to investigate is not itself sufficient to show actual malice (*St. Amant* v. *Thompson* (1967) 390 U.S. 727, 733). There must also be evidence which affirmatively shows subjective knowledge of falsity on the part of the defendant (e.g., *Curtis Publishing Co.* v. *Butts* (1967) 388 U.S. 130,

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[9]Petitioners also imply that the author's research notes show that their rehabilitation program was effective (see Pet., p. 6). They omit those portions of the notes which show that it was not (see Pet.Appx., p. 41a, n. 12).

157, 169 (knowledge of dishonesty of sole source); *Kuhn* v. *Tribune-Republican Pub. Co.* (Colo. 1981) 637 P.2d 315, 319 (reporter admitted that he had "no basis for most of his erroneous statements"); *Stevens* v. *Sun Pub. Co.* (1978) 270 S.C. 65, 240 S.E.2d 812, 815 (source "known to be suspect")).

Here, there is a total absence of any such evidence. Indeed, the uncontradicted evidence demonstrated that respondents' sources were responsible and reputable individuals (see Pet.Appx., pp. 33a-34a).[10] The evidence also demonstrated precisely why no one contacted petitioners. The Digest research editor talked directly with rattlesnake victim Paul Morantz as well as a former Synanon member who had been kidnapped and beaten by Synanon members (p. 291). She also reviewed a tape recording, admitted by petitioners to be genuine, in which petitioner Dederich exhorted Synanon members to inflict bodily injury upon opposing lawyers and their families (p. 290).[11] She con-

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[10]Petitioners note that respondents were aware that petitioners had filed suit against the "primary sources" for the article (Pet., p. 7). However, respondents were also aware that the suit was unprosecuted (p. 2501), and that petitioners had a policy of filing suit against almost everyone who mentioned them in even a slightly critical manner (see Pet.Appx., pp. 38a-39a).

[11]In that tape, Dederich declared:

> "[O]ur religious posture is, don't mess with us. You can get killed. Dead. Physically dead. And we're gonna crack some bones. * * * I want to get some son of a bitch in the basement. Really. And I really do want an ear in a glass of alcohol on my desk. * * *
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> * * * * *
>
> "* * * I'm quite willing to break some lawyer's legs and then tell him the next time I'm going to break your wife's legs. Then I'm going to cut your kid's arm off. And try me, because this is only a sample, you son of a bitch, like that. And that's the end of your lawyer" (pp. 360-361, 368).

cluded that Dederich would not be an unbiased source and also that, because of his talk "about violence and killing," she did not want to meet him (pp. 2569-2570). The author of the article had similar knowledge of Synanon's activities, and he also knew that any attempt to contact petitioners would be futile: "Synanon wasn't answering calls of this kind" (p. 2448).[12]

4. *"Notification of its falsity"* (Pet., pp. 22-23): Although deliberate publication after a notice of specific verifiable facts may constitute evidence of actual malice, no such evidence exists here. The complaint was served on the Digest on January 26, 1982, and on author MacDonald on January 29, 1982. The Swedish and New Zealand issues of the Reader's Digest subsequently were distributed in February and March 1982, respectively. Even if a deliberate decision to go ahead with foreign distribution had been made (and none was shown), nothing in the complaint gave reason to question the accuracy of the article or the reliability of the sources. As the District of Columbia Circuit has noted with respect to a similar argument, "mere general allegations of falsity similar to those contained in the complaint do not suffice" (*Liberty Lobby, Inc.* v. *Anderson* (D.C.Cir. 1984) 746 F.2d 1563, 1569).

Moreover, respondents were aware that:

> "'Synanon's 40-member legal department often used the courts to silence articles and block efforts at governmental control.' A National News Council report described Synanon as using litigation 'for coercing the press into silence about Synanon and its affairs,' and

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[12]Petitioners make passing reference to two prior articles published in the Digest in 1970 (Pet., pp. 7-8, 21). Those articles dealt with matters occurring before 1968, and they were in no way contradictory to the article published in 1981 (Pet.Appx., p. 41a, n. 12; see pp. 1924-1935).

> the Pulitzer Prize Committee, in awarding the prize to the Mitchells, praised their refusal to yield to threats of lawsuits" (Pet.Appx., pp. 38a-39a).

It would be ironic indeed if petitioners' litigation and other efforts to deter publication were converted into evidence of actual malice.

5. *Sources "casting doubt" on reports* (Pet., pp. 23-24): Here, petitioners engage in their most egregious misrepresentations of the record. They seize upon testimony relating to whether certain precise words were stated by Reader's Digest sources (see Pet., pp. 7, 23-24, 70a-80a), and they wholly ignore the evidence, both in testimony and writings, which shows that the article was an entirely accurate report. These matters are fully discussed in the opinion below (see Pet.Appx., pp. 41a, n. 12, 42a-55a). We note here only that petitioners' claims are refuted by their own admissions. As petitioner Dederich declared in 1977:

> "We are *not,* a, a, a rehabilitation place * * * for dope fiends. We're, we're not. We stopped being that a long, long time ago. Very, very little of our energy goes into that situation. Almost none. * * * [T]hat notion is, is ten to twelve years old, that we are somehow a rehab place for dope fiends. * * *
>
> * * * * * *
>
> "* * * [W]e can't call ourselves any kind of a rehab place. * * * We say that, we're lying, we're just lying" (pp. 3459, 3464) (emphasis in original).

In view of such admissions, petitioners cannot claim that others who reached similar conclusions did so maliciously.

III. PETITIONERS ARE PUBLIC FIGURES.

Petitioners falsely assert that there was "no pending public controversy" about them or their works (Pet., p. 27). The opinion below reviews in detail the publicity which was

sought and obtained by petitioners, and it discusses the public controversy which arose about the effectiveness of their rehabilitation program (Pet.Appx., pp. 22a-25a).[13] The record is replete with uncontradicted evidence pertaining to petitioners' well-publicized criminal violence and other criminal activities (see pp. 1198-1213, 1227, 1243-1244, 1254, 1261, 1362-1363, 1368-1369, 1432).[14]

This is not, as petitioners would have it (Pet., p. 26), the case of an unwilling participant in a newsworthy event. Rather, petitioners' own voluntary acts and their own deliberate injection of themselves into the continuing public controversy about them and their self-declared public "good works" demonstrate beyond cavil that they are public figures. As the court below observed:

> "Synanon and its founder have sponsored massive publicity and self-promotion efforts over a period of many years and apparently *increased* these efforts with regard to the present controversy. As such, they enjoyed remarkable access to the media through which to counter any criticisms they deemed to be unwarranted and voluntarily exposed themselves to increased risk of injury from unfavorable commentary about them. Thus they have clearly met the standards for 'public figure' status for purposes of this defamation action" (Pet.Appx., pp. 25a-26a) (emphasis by court).

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[13]The opinion also notes, but it does not base its public figure conclusion upon, petitioners' judicial admissions of their notoriety (see Pet.Appx., p. 22a, n. 7).

[14]Indeed, petitioners concede that "many allegations of violence and misconduct • • • have been published for many years about Synanon and Mr. Dederich" (Pet., p. 4). Petitioners' criminal misconduct has also been judicially noted (see *In re Sealed Case* (D.C. Cir. Feb. 8, 1985) (D.C.Misc.Docs. 84-0144, 84-0145) . . . F.2d . . ., 1 LawMan.Prof.Conduct 651; *Synanon Church* v. *United States* (D.D.C. 1984) 579 F.Supp. 967, 971-972).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

THE SYNANON CHURCH, CHARLES E. DEDERICH,
Petitioners,

– AGAINST –

READER'S DIGEST ASSOCIATION, INC., DAVID MACDONALD,
Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

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ARGUMENT

THE RECENT FILING OF THE PETITION FOR WRIT OF CERTIORARI IN ANDERSON V. LIBERTY LOBBY AND THE RECENT OPINION BY THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT IN THE TAVOULAREAS CASES FURTHER DEMONSTRATE THE EXISTING CONFLICT BETWEEN THE OPINION OF THE LOWER COURT AND THE OPINIONS OF THIS COURT, FEDERAL COURTS OF APPEALS AND OTHER STATE COURTS OF LAST RESORT.

The Petition for Certiorari filed in this Court in *Anderson v. Liberty Lobby* (No. 84-1602), together with the instant Petition, demonstrate one of the critical conflicts now raging in the courts as to the proper treatment of a libel

case: Is summary disposition of a libel case a favored remedy such that a plaintiff is required to prove his case before trial with convincing clarity, as the *Reader's Digest* Court held, or are rules on summary disposition the same for a libel case as in any other tort case, as this Court has indicated and the *Liberty Lobby* Court has held? This conflict can only be resolved by this Court.[1]

The opinion in *Tavoulareas v. Piro* and *Tavoulareas v. Washington Post*, No. 83-1604 and No. 83-1605, slip op. (D.C. Cir. April 9, 1985) further highlights the conflicting formulations of significant rules governing libel cases and the need for this Court to resolve these matters.[2] The *Tavoulareas* Court considered many of the same issues raised in the instant Petition and resolved those issues in a diametrically contradictory way to the *Reader's Digest* Court. The dissenting opinion by Judge Wright also offers a further illustration of the sharp polarization in the courts on these constitutional issues. Following is a list of rules enunciated by the *Tavoulareas* Court with a reference to portions of the instant Petition demonstrating the conflict between the *Tavoulareas* Court's analysis and the *Reader's Digest* Court's analysis:

> 1. The safeguards in *New York Times Company v. Sullivan*, 376 U.S. 254 (1964) adequately protect against any potential chilling effect on First Amendment liberties which may be caused by a libel proceeding, and, therefore, summary disposition of a libel

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[1]Since the conflict between the two cases was extensively briefed in the Petition in the instant case and since the conflict can be further seen by comparing Anderson's Petition, Petitioners will not burden this Court with repetitive argument.

[2]Copies of the slip opinion are lodged with the Court and served on opposing counsel. References to portions of the slip opinion are indicated herein as "*Tavoulareas* Opinion."

suit is not a favored remedy. *Tavoulareas* Opinion, 18-19. *Compare,* Petition, Argument I, at 10-16.[3]

2. Courts must follow in libel cases the normal rules for examining evidence on summarily dispositive motions, including adherence to the prohibition against weighing evidence, the prohibition against evaluating the credibility of witnesses, and the requirement that all reasonable inferences must be made in a light most favorable to the party opposing the motion. *Tavoulareas* Opinion, 19-27. *Compare,* Petition, 16 n. 11.

3. A libel plaintiff does not need to have a single piece of evidence which by itself establishes actual malice, but may prove actual malice by the cumulative effect of circumstantial evidence. *Tavoulareas* Opinion, 38-39, 43, 56, 74 n. 48 and 82. *Compare* Petition, Argument II, at 17-19.

4. Evidence that a writer knowingly adopted an adversarial mind-set toward the plaintiff is "highly probative of whether he acted knowingly or recklessly in writing his falsehoods." *Tavoulareas* Opinion, 50. *Compare,* Petition, 6 ("very, very nasty indeed"), 9 and 20 ("I initiated 1st expose — but, alas, the story was ignored") and 6 and 21 (failure to contact petitioners or anyone possibly favorable to petitioners).

5. The *New York Times* actual malice standard adequately protects the public's interest in the watchdog service that newspapers perform, and the public interest "is not further protected by requiring the jury to blind itself to evidence of editorial pressure for sensationalistic stories." *Tavoulareas* Opinion, 54 n. 39. *Compare,* Petition, 9 & n. 8. (Petitioners' need for discovery from editors.)

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[3]References to portions of Synanon's and Mr. Dederich's Petition for Certiorari are indicated herein as "Petition."

6. A defendant's selection of the most damaging inference from among a number of ambiguities, even if the inference is objectively reasonable, may be probative of a determination to incorrectly describe the plaintiff, place him in the most damaging light, and thereby with other evidence demonstrate a state of mind that is probative of a reckless disregard for the truth. *Tavoulareas* Opinion, 55. *Compare,* Petition, 7 n. 6 (literary license), 9 n. 7 (editorial deletion).

7. "The writer who suppresses favorable facts is more likely to suspect that his version is not substantially true. Hence, courts have held repeatedly that the choices of *which* facts to report *is* relevant to the question of actual malice. [Citations.] [¶] Similarly, deliberate slanting is further evidence of a purpose to 'get' the plaintiff and is thus probative of actual malice." *Tavoulareas* Opinion, 61 (emphasis in original). *Compare,* Petition, 8-9 (editorial deletion of Jack Hurst as a "onetime heroin user" over reporter's objection for "accuracy"), and 21 (failure to contact petitioners or anyone possibly favorable to petitioners).

8. When a source denies having told the reporter what the reporter claims to have been told, it is plausible that either the source or the reporter is being less than truthful. Since it is possible that the reporter deliberately falsified his notes, which must be considered in looking at the evidence in the light most favorable to plaintiff, and since the determination requires evaluating credibility, it is inappropriate for a court to resolve the issue on a motion for summary disposition. *Tavoulareas* Opinion, 64. *Compare,* Petition, 7, 23-24 and Appendix E (Assertions of Reader's Digest Contradicted by Ofshe & Mitchell).

9. "Reliance on the unsupported word of obviously biased sources for key allegations is *evidence* which a jury is entitled to consider in evaluating the existence of actual malice." *Tavoulareas* Opinion, 74 (emphasis in original); *see, generally*, 67-74. *Compare*, Petition, 7 and 21 n. 13.

10. "Falsehoods uttered at leisure are more likely to be deliberate than those published in haste. Absence of time pressure in this case is evidence that the jury could fairly consider." *Tavoulareas* Opinion, 75. *Compare*, Petition, 6, 21-22 (no time pressure for article, grossly inadequate investigation, and admission that story was not hot news).

The foregoing index of conflicting points designates where the *Tavoulareas* Court and the *Reader's Digest* Court are in irreconcilable conflict. The pending *Anderson v. Liberty Lobby* Petition, when compared to the instant Petition, further shows the current judicial conflict. The rules for libel cases in the District of Columbia Circuit are diametrically contradictory to the rules in the State of California, and both jurisdictions claim to be bound to their positions by decisions of this Court. These conflicts, with the other conflicts among the federal courts of appeals and the state courts of last resort as presented by the Petition

and this Supplemental Brief, can only be resolved by this Court, and such resolution is of the utmost urgency.

Respectfully submitted,

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